Elmer E. Ellsworth

AMERICAN BAR ASSOCIATION JOVRNAL

MAY 1944

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There is . . . "a time to laugh" . . .

Ecclesiastes 3:4

A Mexican who spoke little English walked into a California school building which houses Red Cross, rationing and other war-time offices. A nurse took his name, address and other data, and sent him to a room where attendants drained the usual pint of blood.

Then the bewildered donor asked: "Is it now I get my gasoline?"

Three managers of chicken farms in Germany were being questioned by a Gestapo man. "What do you feed your chickens?" the first was asked.

"Corn."

"You're under arrest! We use corn to feed the people!"

The second manager overheard the conversation and tried to play safe.

"What do you feed your chickens?" came the question.

"Corn husks."

"You're under arrest! We use the husks to make cloth. And you?" he asked, turning to the third man.

"I give my chickens the money and tell them to go and buy their own food."

There's the woman who confided at her club that her husband's average income was about midnight.

Four young men visiting the Orient before the war, considering themselves exceedingly clever, had a Chinese servant upon whom they played all sorts of pranks. One night they nailed his shoes to the floor. But there was not a word of complaint, nor sign of retaliation. He brought them their coffee as usual smiling.

The next day they put sand in the Chinaman's bed. But when he brought them their coffee, there was no resentment in his attitude, and he smiled blandly as usual.

So the young men decided they would play no more tricks on a good fellow like that, and they told him so.

"No more putee sand in bed?" asked the Chinaman.

"No."

"No more nailee shoes to floor?"

"No."

"Velly well," he agreed, with a genuine Chinese smile, "then no more putee mud in coffee."

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IN THIS ISSUE

Our Cover—Elmer Ephraim Ellsworth, lawyer-soldier, is the subject of our cover portrait and of another fascinating biographical sketch by our historian, George R. Farnum, of Boston. Ellsworth organized a military company known as The Black Plumed Riflemen, read Blackstone while subsisting on crackers and water and later organized a Zouave regiment from the New York City fire department, the New York Fire Zouaves. He lost his life while taking down a Confederate flag floating over the Marshall House in Alexandria, Virginia.

Judge-Made Law and the Education of Lawyers—Unusually challenging and forward-looking is the article by Professor John Barker Waite, of the University of Michigan Law School, on "Judge-Made Law and the Education of Lawyers." In view of current discussions this scholarly analysis is as timely as could be. Many of our readers may disagree fundamentally with Professor Waite's theses, but the JOURNAL feels privileged to publish so provocative a contribution to "recommended reading." Some comment concerning it is on the editorial page.

The Post-War Lawyer—Donald R. Richberg, of the Illinois and District of Columbia Bars, poses the questions, "What service is the American lawyer going to render in the reconstruction of a war-shocked world?" and "Has the legal profession of the oncoming generation been educated to fulfill its high responsibilities or only trained to serve the materialists and self-proclaimed realists who have almost destroyed the great idealism that we call civilization?" We recommend this article to our readers.

The New Department—For the second time, the JOURNAL presents to its readers the experimental new feature, inaugurated in our March issue, as "The Practising Lawyer's Guide to the Current Law Magazines." The extent of interest manifested has led to a more inclusive coverage of the law reviews than was at first undertaken. The purpose is to acquaint practising lawyers and others with the wealth of potentially useful material which is contained in current law reviews, and to make it accessible to those who think they may be helped by it.

ANNUAL TOPICAL INDEX

In Volume 62 of the American Bar Association Reports there was printed a complete index of subjects dealt with in the first 23 volumes of the JOURNAL. In Volume 65 of the Reports and subsequent volumes, topical indexes of Volume XXIV of the JOURNAL and of each succeeding volume, have been printed. Reprints are available at $1 each of the topical index of the first 23 volumes.

Report as to Wagner-Murray Bill (S. 1161)—As promised in our April issue, we present a summary of the notable report prepared by a subcommittee of the Board of Governors and approved by the Board of Governors and the House of Delegates on February 29, as to such parts of the Wagner-Murray bill (S. 1161) as were found to contravene the principle declared by the House of Delegates last August, in opposition to federal control over the medical profession, medical practice, hospitalization, etc., which traditionally have been under the supervision of the states.

Review of Supreme Court Decisions—Since the last case reviewed in the April number and up to the time of going to press, the Supreme Court has handed down twenty-one opinions. In ten of the cases there were dissents.

The Price Control Act and the anti-inflation amendment to that Act brought before the Court several important controversies. *Yakus* v. *United States* involved important questions affecting the methods of procedure prescribed by the Act for what have become known as "black market" sales. The conviction of two Boston butchers was affirmed.

In *Bowles* v. *Willingham*, the rent control provisions of the Price Control Act were upheld against a challenge of unconstitutionality.

In *Vinson* v. *Washington Gas Light Co.*, the regulation of public utility rates and the right of interventions before state commissions was discussed and it was held that the power to review rates of common carriers and public utilities was not conferred upon the Price Administrator, but was left to be exercised according to previously existing law.

There were also important labor decisions. In the *Tennessee Coal, Iron & R. R. Co.* case, the Court declined to define precisely the terms "work" and "workweek," declaring them subject to practical construction. On that basis and in view of the particular facts, it was held that underground traffic in the Tennessee iron mines constitutes part of the workweek and is compensable as such.

In *Medo Photo Supply Corporation* v. *NLRB*, the Court sustained a ruling of the Labor Board that after a labor union majority had indicated their choice of a bargaining agent and while negotiations were pending with the employees, the employer at the request of the new majority could not terminate the negotiations and that such conduct was an unfair labor practice.

Summary judgments, an important procedural device to expedite the termination of litigation when only questions of law are presented, were discussed in *Sartor* v. *Arkansas Natural Gas Corporation*.

ANNUAL MEETING

CHICAGO, ILLINOIS

September 11-14, 1944.

The Sixty-Seventh Annual Meeting of the American Bar Association will be held at Chicago, Illinois, September 11 to 14, 1944. Further information with respect to the meeting will be given in the JOURNAL from time to time.

Hotel Accommodations

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To avoid unnecessary correspondence, members are requested to be specific in making requests for reservation, stating hotel, **first and second choice,** number of rooms required and rate therefor, names of persons who will occupy the same, arrival date and, if possible, definite information as to whether such arrival will be in the morning or evening.

Requests for reservations should be addressed to the Reservation Department, 1140 N. Dearborn Street, Chicago, Illinois.

JUDGE-MADE LAW AND THE EDUCATION OF LAWYERS

By JOHN BARKER WAITE

Professor, University of Michigan Law School

LORD BACON'S dictum that the function of judges is only "*jus dicere,* and not *jus dare;* to interpret law and not to make law,"[1] gave place in due course to Justice Holmes' recognition that "judges do and must legislate, but they can do so only interstitially; they are confined from molar to molecular motions."[2] Today, it would be hardihood to deny that judges can, and do, legislate massively as well as molecularly.[3] Nor would one lightly regret that fact. To the contrary, I dare say that a power of judicial legislation suits this country's needs better than would any other system. The fault in the system is not that judges legislate, but that they are not trained nor equipped with facilities to legislate wisely. That, I believe, the ablest judge would be first to concede.

Legislatures, before they act, can have, theoretically do have, thorough knowledge of the conditions upon which action is based. They may hold committee hearings; wishfully or otherwise they will hear from pressure groups advocating or opposing a proposed law; newspapers will editorialize, radio commentators offer advice, constituents write letters. From one source or another, every open-minded legislator can have before him at least much of the data necessary to wise decision. But none of that is the situation when courts make law. As conditions now are—not as I shall later suggest they should be—judges making *de novo* decisions, which as they are later followed thus become "law," have but two sources of information as to the practical need or the actual effect of one decision or the other. They must rely upon their own experience and observation; or they may hope for information presented by attorneys representing the litigants. And neither source, I venture to insist, has been enough for sound decision and resultant rule making.

With the advent of peace and its flux of new conditions, the need for judicial legislation will pervade still wider fields of what now seems established law. The evil of insufficient knowledge will reach still greater scope unless corrected. It can be corrected, of course; partly through the law schools, mainly from education outside the law. But first, before correction can even be sought, the existence of the evil must be appreciated. At the risk of merely elaborating the commonplace—but a commonplace too often ignored and even denied—let me exemplify with illustrations from my own limited observation, the fact that courts have made definite rules for the governance of our economic and social activities; some based on reasons lost in antiquity, some of highly questionable wisdom, and some unhappily founded on insufficient knowledge of their probable effects.

The "Ownership" of Goods

Assume that the owner of a chattel lends, leases or otherwise bails it to a second person; the latter sells and delivers it to a third, who purchases for full value in honest belief that his seller is owner; the intermediary then fades from the picture. Either the original owner-bailor is bound to lose his chattel, or the purchaser in good faith will lose what he paid. Obviously the wise rule of determination for such cases is a matter of economic policy. In France the rule was adopted of protecting the purchaser, to the end that trade in chattels should be as fluid as possible; somewhat, I gather, as the negotiability of promissory notes grew from the practical needs of commerce. In Germany the purchaser from a bailee, as distinct from a thief, was protected; apparently upon the historical accident of pleading, which required one seeking repossession to allege that he had not parted with possession voluntarily. In Anglo-American courts, on the contrary, the original owner is protected, except as he may have estopped himself, or under the narrow rules of "market overt."

The genesis of this Anglo-American rule, and the rationale behind it, I have been unable to discover. Years ago I tried to trace them. I can not complain with Mr. Carter that I was "bandied from Coke to Croke, from Plowden to the Year Books, from thence to the Dome Books, from *Ignotum* to *Ignotius,* in the inverse ratio of philosophy and reason; still at the end of every weary excursion arriving at some barren source of pedantry and quibble."[4] I did not get that far back; nor did I find pedantry and quibble. Beginning with

1. Essays; ch. 56.

2. *Southern Pacific Co.* v. *Jensen,* 244 U. S. 205, 221 (1917).

3. One judge thought so a hundred years ago. "Ours is not the only state where the common law seems to be undergoing radical changes in some of its fundamental principles, not by legislative authority, but by the will of the courts. Nay, we find ourselves quite outstripped in this work of improvement by some of our more enterprising or more venturesome neighbors." Caton, J., dissenting in *Seeley* v. *Peters,* 10 Ill. 130, 154 (1848), citing some striking examples.

4. Walter Clark, "Some Myths of the Law," 13 Mich. L. Rev. 26, 28 (1914), quoting J. C. Carter.

various decisions which applied the rule I ran back along their citations, through ramifications which spread widely then narrowed to common sources. Ultimately the line ended with the Year Book 5 Henry VII, p. 15 (1490), which was a decision in favor of the original owner, without citation of authority, or reason given.[5] What is more important, nowhere in all the decisions did I find the slightest attempt even to consider the economic wisdom of the rule. If it ever had a basis in economic desirability, as I presume it did, the reason is lost in the mist of time, and contemporaneous courts decline to reappraise its utilitarian, social value.

The Fixing of Resale Prices

But the genesis of another legal rule with drastic economic consequences is more clearly discernible. The Dr. Miles Medical Co., producers of Peruna, had set up protection against hurtful price cutting by requiring all its distributors to enter into contracts not to sell Peruna below a fixed price. Eventually John D. Park & Sons Co., which had refused to enter into such a contract with the Medical Co., conspired—according to petitioner's bill—with other dealers in drugs to obtain a quantity of Peruna by false representations, and had advertised it for sale at less than the fixed price, "thus to attract and secure custom and patronage for other merchandise, and not for the purpose of making or receiving a direct money profit." To end such practices the Medical Co. sought an injunction.[6]

Remedy was denied upon the ground that retail price fixing contracts are "contrary to public policy" and void. One need not necessarily protest the merits of the decision itself; but he can not avoid wonder at the lack of real consideration of economic facts in reaching the decision. If the contracts are economically hurtful to society, wherein are they hurtful, and how? One might have expected a showing of the actual operation of such contracts, of the evils they were designed to meet, of the evils their existence created; of data, in short, from which their social utility or disadvantage might intelligently be deduced. But, to the contrary, in neither the circuit court report nor in that of the Supreme Court is there a word of such matters. Of the latter's thirty-nine pages, twenty are given over to statement of facts and briefs of counsel, in none of which are the actual effects of such contracts discussed. Of the opinion itself, seven pages point out that the contracts were not merely limitations on the authority of the petitioner's immediate agents; three more say that the secrecy of petitioner's formula does not affect the problem; two pages state, without reason given, that a manufacturer has no legal right to control the resale price of goods merely because he manufactures them. Perhaps three pages of the majority opinion relate precisely to that basic question of whether or not such contracts are unreasonably in restraint of trade; are in truth contrary to public policy. And not one word in those pages reveals the economic facts upon which the Court's conclusion was based, nor in any way pretends to evaluate the socio-economic wisdom of so drastic a rule.

As a natural consequence, the Court's notion of economic policy met with prompt and vigorous criticism. In a dissenting opinion Justice Holmes, though he offered no socio-economic data of his own, said flatly:

> There is no statute covering the case; there is no body of precedent which by ineluctable logic requires the conclusion to which the Court has come. The conclusion is reached by extending a certain conception of public policy to a new sphere. On such matters we are in perilous country. I think that, at least, it is safe to say that the most enlightened judicial policy is to let people manage their own business in their own way, unless the ground for interference is very clear . . . I can not believe that in the long run the public will profit by this Court permitting knaves to cut reasonable prices for some ulterior motive of their own and thus to impair, if not to destroy, the production and sale of articles which it is assumed to be desirable that the public should be able to get.

State courts declined to follow the Supreme Court's notion of policy. Said one judge, to whom data had been presented by complainant's counsel,

> On the argument there was, and in counsel's brief there is, a long discussion as to whether the contract against price cutting, evidenced by notice, is contrary to public policy, and defendant relies upon cases in the Supreme Court of the United States. . . . I am now considering the public policy of the State of New Jersey as distinguished from any public policy of the United States. . . . After careful consideration, I have come to the conclusion that upon the general proposition I agree with the dissenting opinion of Mr. Justice Holmes. . . .[7]

Nevertheless the apparently uninformed ruling of the Supreme Court became the law in many jurisdictions, fundamentally affecting the conduct of important business, until overturned by legislative repudiation of the Court's idea of public policy in the now widespread Fair Trade Acts.[8]

The Effect of Unreasonable Search

Some years after promulgation of this highly questionable economic rule, the courts put into operation another peculiar notion of policy, which has seriously hampered effective protection of society against crime. They evolved a judge-made rule that evidence obtained by "unreasonable" search can not be used even to the end of convicting criminals whose

5. The details of that search and the persistence of the rule without reason are discussed, Waite, "Caveat Emptor and the Judicial Process." 25 Colum. L. Rev. 129 (1925).

6. *Dr. Miles Medical Co.* v. *John D. Park & Sons Co.*, 220 U. S. 373 (1911).

7. *Ingersoll & Bro.* v. *Hahne & Co.*, 88 N. J. Eq. 222 (1917), affd. 108 Atl. 128. A discussion of the whole problem can be found in Waite, "Public Policy and Personal Opinion," 19 Mich. L. Rev. 235 (1921).

8. See Oppenheim, *Recent Price Control Laws*, West Pub. Co., (1939); see also *Old Dearborn Distilling Corp.* v. *Seagram Distillers Corp.*, 299 U. S. 183 (1936); 35 Mich. L. Rev. 659 (1937); Miller-Tydings Enabling Act, 15 U. S. C. (1938) sec. 1, 50 Stat. L. 693.

guilt it would prove. Suggested in 1886, the rule was formulated by the Supreme Court in *Weeks* v. *United States*, in 1914.[9] Until the advent of National Prohibition it found no acceptance in state courts and fell almost into desuetude in the federal courts themselves.[10] But in the emotional turbulence of Prohibition new judicial ideas of public policy developed.

Michigan led the parade of state courts into acceptance of the federal rule of exclusion in 1919, holding that unlawfully possessed liquor, taken from its possessor by what that court chose to call "unreasonable" search, must be returned by law-enforcement officers to its unlawful owner.[11] Next year the Kentucky court reversed a liquor-law violation on the ground that evidence obtained without a search warrant should not have been used.[12] Thus began a wide-spread adoption by state courts of the policy of precluding conviction for crime if the evidence of the defendant's criminality had been obtained by methods of which the judges sufficiently disapproved to characterize them as unreasonable search.[13]

That this choice of policy, originated in the Supreme Court and adopted by some state courts, was a free judicial choice no one would deny. In the words of Justice Holmes, advocating an even more drastic rule of exclusion, "There is no body of precedents by which we are bound, and which confines us to logical deduction from established rules. Therefore we must consider the two objects of desire, both of which we can not have, and make up our minds which to choose. . . . We have to choose, and for my part I think it a less evil that some criminals should escape than that the government should play an ignoble part."[14] But upon what facts, upon what real information of good to be accomplished, or of evil to be prevented, those various judges based their choice, he is an abler man than I who can determine from their written opinions.

No sophisticate in American law would ever question the high intelligence of a jurist like Holmes. But his knowledge, after four decades in the cloisters of an appellate court, of the realities, the difficulties, the needs of effective law enforcement one may quite reasonably suspect. In any event, the "some criminals" whom he thought might safely be permitted to escape conviction have proved in fact to be thousands—liquor-law violaters, dope peddlers, carriers of concealed weapons, receivers of stolen property, swindlers, thieves, robbers and burglars. Police behavior, as an effect of the rule judicially chosen, became infinitely worse rather than better.[15] It is incredible that judges would have made the choice of policy they did had those probabilities been presented—as they might have been.

Retail Responsibility for Food Sold

In 1918 another judical notion of public policy, of seriously questionable wisdom, was thrust upon society; again without a shred of justifying data. A retail grocer had sold a can of beans to a customer. The grocer had not himself packed the beans; he had no more knowledge of the actual content of the can than did the customer himself; nor was he in a position to have known more about it. The customer was injured because of a pebble among the beans and sued the grocer. As a matter of long established precedent he was entitled to no recovery from the equally innocent grocer. Against the packer of the beans he might logically, legally, have had an enforceable right. But the grocer had in no way been at fault; he had made no promise whatsoever in fact; he had made no representation concerning the beans, either expressly or by reasonable implication, save, at most, that he had himself bought them from a responsible packer. On no theory of tort or of contract could liability of the grocer to the customer be based. Nevertheless the Massachusetts court allowed the customer a recovery.[16]

There were circumstances in the particular case calculated to shipwreck logic. In a certain broad sense, the retailer had been also the packer, or so closely connected with the unrevealed packer as to share in the latter's liability. Had the court made the liability a packer's responsibility and then held the retailer to be legal representative of the packer and for that reason liable, one might have said that the decision involved no new idea of public policy. But the decision, though logically insupportable, has been accepted and followed by numerous later courts as the origin of a flat rule that retailers of food are liable for imperfections therein, regardless of actual responsibility for the defect, without promise to make good, and without false representation of its quality expressed or implied.

This liability has been worked out with an appearance of logic and of adherence to precedent by judicial —though one can not say judicious—use of a "four term" fallacy. Sellers who "warrant" their goods against defects have long been liable for defects which later appear. Sellers of food "warrant" what they sell. Ergo, a seller of food is liable for any defect in it. An impeccable syllogism! Even a commentator has fallen for it.[17] But unfortunately, the term "warrant" as used in the minor premise carries a different significance from that of its use in the major premise. Historically, a

9. 232 U. S. 383 (1914).

10. The few federal decisions which followed the rule of exclusion, and the several state decisions which repudiated it are collected in Wigmore, *Evidence*, 2d ed. sec. 2183N. ff.

11. *People* v. *Marxhausen*, 204 Mich. 559, 171 N. W. 557 (1919).

12. *Youman* v. *Commonwealth*, 189 Ky. 152, 224 S. W. 860 (1920).

13. The lack of any established criterion of "unreasonableness" is pointed out, Waite, "Searches and Seizures—The Criterion of Reasonableness," 42 Mich. L. Rev. 147 (1943).

14. *Olmstead* v. *United States*, 277 U. S. 438 (1928).

15. See Waite, "Rules of Evidence and Police Regulation," 42 Mich. L. Rev. 679 (1944).

16. *Ward* v. *Great Atlantic & Pacific Tea Co.*, 231 Mass. 90 (1918).

17. Brown, "The Liability of Retail Dealers for Defective Food Products," 23 Minn. L. Rev., 585 (1939).

"warranty" has always connoted either a promise, or a representation of some kind. It might be an implied promise or representation, but its existence had to be reasonably inferrable from the transaction. Until the *Atlantic & Pacific* case that was the whole basis of the seller's liability on warranty—a representation expressed, or fairly and reasonably inferrable by the purchaser. But in the *Atlantic & Pacific* bean case, as in those which have followed it, there was obviously no representation expressed. Nor, inasmuch as in such cases the seller knows no more of the contents of a can, has no opportunity to learn more, is not in a position where he ought to know more than the buyer himself; inasmuch as seller and buyer stand on absolutely equal planes of justifiable ignorance of defects, no representation to the contrary by the seller can possibly be inferred with any pretense of reason. Under such circumstances, the liability of the seller, however often it be misdenominated one of warranty, is in truth no more than an insurer's liability imposed by the courts on sellers of food—and not on sellers of other things—because the courts, for an undisclosed reason, believe that to be a wise public policy.

The wisdom of such a policy and the arguments for or against it are too involved to permit of discussion here. Personally, from some study of the rule's probable effects, I am convinced that the evils it is likely to produce, its bad effect on the economics of trade and of consumers' costs, outweigh any possible good that it might produce. But that, for the moment, is not material; what is important is the fact that neither in the decision which originated the rule, nor in those which adopted it, nor in those which repudiated it and adhered to the earlier law, can one find any evidence of judicial study, or even knowledge, of how it would operate, of what good or evil it would accomplish in actual effect.[18]

The Effect of Police Dereliction of Duty

Last year the Supreme Court promulgated a new rule of evidence, designed for the purpose of regulating police conduct. In *McNabb* v. *United States*[19] it appeared that suspected murderers of a revenue agent had been arrested on a Thursday morning. They were held in custody, but not taken before a committing magistrate until Saturday. In the meantime the police had elicited from them certain incriminating admissions and a confession which were used in evidence at their trial, which resulted in their conviction. Under the law the suspects should have been taken before a magistrate "immediately" after arrest. The Supreme Court reversed the conviction on the ground that the information elicited from them between arrest and their production before the magistrate should not have been admitted in evidence. The Court did not pretend that the admissions had been "compelled" in any way. It expressly disclaimed any intent to justify the reversal on violation of constitutional provisions, and admitted quite frankly to promulgating a new rule—that evidence obtained by peace officers while in such dereliction of duty should not be available to society for conviction even of a murderer. Thereafter the Supreme Court's Advisory Committee on Rules of Criminal Procedure embodied the proposition in the tentative draft of rules submitted for consideration by the Bar.

Protests against it were prompt and vigorous. The gist of them was epitomized by J. Edgar Hoover, director of the Federal Bureau of Investigation, who declared that adoption of the rule "would handicap law enforcement, would be contrary to public interest, and would serve only the criminal whose advantages seem to be paramount to the public welfare in the suggested procedural requirement. . . . All United States Attorneys with whom this proposed rule has been discussed by representatives of the FBI are opposed to its adoption."[20] Mr. Hoover backed up his protest of the Court's notion of wise policy by specific illustrations where evasion of extremely dangerous criminals might have resulted had the Court's policy been then in effect.

In the Committee's revised draft of proposed Rules that novel judicial idea of policy was omitted. Again, however, the important matter here is not the true wisdom or otherwise of the Court's policy, but the reasonable suspicion that the judges who promulgated that policy, undeniably able though they are, possessed no data upon which to base it, no information by which to judge its effect for good or evil, except their own, may I say academically acquired, knowledge.[21]

Judicial Law-making Requires Data and Expert Aids

These illustrations of judicial law making are but the examples which I have had occasion to study within the limited fields of my own teaching. There must be many more in other fields.[22]

18. The policy of the rule is discussed to some extent, though with very little in the way of actual data, Waite, "Retail Responsibility and Judicial Law Making," 34 Mich. L. Rev. 494 (1936); Brown, "The Liability of Retail Dealers for Defective Food Products," 23 Minn. L. Rev. 585 (1939); Waite, "Retail Responsibility—A Reply," *id* p. 612.

19. 318 U. S. 332 (1943), 56 Harv. L. Rev. 1008.

20. From a letter to the Committee, quoted with Mr. Hoover's approval.

21. More fully discussed, Waite, "Rules of Evidence and Police Regulation," 42 Mich. L. Rev. 679 (1944). Since the foregoing was written, decisions of lower courts have carried the new policy to extremes and have released upon society a number of actually, though not "legally", provable dangerous persons. See 42 Mich. L. Rev. —. The matter is again before the Supreme Court, in *U. S.* v. *Mitchell*, and may have been decided by the time this appears.

22. *e.g.*, The liability of a railroad for fires indirectly resulting from its operation; the economic merits of the doctrine of *Price* v. *Neal* in respect of negotiable instruments; the legal inability of dress manufacturers to protect themselves against piracy of designs; the rule that "acceptance" of a contract of insurance becomes effective without necessity for "communication;" the obligation of riparian owners to permit fishing in streams; the social desirability, or undesirability, of "Bank Night" at the movie theaters; *etc., ad lib.*

The difference between modern notions of sound policy and what a court once thought wise is illustrated by *In re Jacobs*, 98 N. Y. 98 (1885), invalidating a legislative prohibition of cigars in tenement houses. "Such legislation," said Earl, J., "may invade

Most of what I have been trying to say was summed up by Justice Brandeis in protesting the majority opinion that legislative limitation of bakers' bread to specific loaf sizes was unsound public policy and void. He said:

> Knowledge is essential to understanding; and understanding should precede judging. . . . In this case we have merely to acquaint ourselves with the art of bread making and the usages of the trade; with the devices by which buyers of bread are imposed upon and honest bakers or dealers are subjected by their dishonest fellows to unfair competition; with the problems which have confronted public officials charged with enforcement of the laws prohibiting short weights, and with their experience in administering those laws.[23]

This premise that judges need knowledge before they can legislate wisely once assumed, two conclusions therefrom are what Justice Holmes might have called ineluctable.

First, advocates must be educated to provide the courts with data, with information concerning the social or economic problem under consideration, as effectively as they are now educated to provide information concerning statute, precedent and principle.

Second, courts must be equipped with facilities for obtaining that information when advocates fail to supply it.

Lawyers Need to be Equipped to Supply Courts with Extra-Legal Information

In equipping lawyers to provide extra-legal information as well as legal knowledge, the obvious first requirement is to teach them that courts need it; that courts do make law; that they do depart from precedent, and do determine policies of individual relationships not yet established by precedent; hence, that courts must have instruction in facts outside the purview of precedent and statute. The teacher who attempts this in his classes treads a slippery path. In the endeavor to demonstrate that courts make law where there is no law he risks provoking an unwarranted assumption that there is no law. (Admittedly I am anything but precious in the use of "law.") He must teach, if he can, as a sapient and delightful jurist-writer learned:

> A wise teacher caught him early in his studies and gave him a clear picture of the two extremes of fundamental juristic thought: blind adherence on the one hand to decided cases which will provide a rule to be applied in all resembling cases, and on the other hand a conception of the law as a series of isolated dooms having little or nothing to do with one another. Between the over-general and the over-specific he saw with fair clarity the need of mediation to produce an elastic principle of growth. . . .
>
> He had been on the Bench only a short time before it became clear to him that if he was to spend his life in court and not in the academy or library, he had to know the law, but not as learning for its own sake. What he had to know above everything was its reason, in order to shape it when occasion seemed proper. The human imponderables were so elusive behind the screen of rules that Ulen felt he must be constantly on guard to stand by the precedents only so long as an artful eye could discern that the community still regarded them as good law. When the point of change arrived, the Bench had to clear new paths, and some day it might be wise enough to be trusted with the whole process, as the Chinese judges were. But not yet. The community mistrusts an intellectual process and will keep the chains of precedent about the Bench and permit judges to bend the rules only when they must or when they dare and can prove the benefit.[24]

Judges May Heed the Imponderables More Than the Precedents

Only when the disciple appreciates that judges may heed the imponderables beyond the precedent is there sense in urging him to discover those imponderables; only when he appreciates that courts are free to legislate, and do themselves make rules, can he be taught to search out all the factors by which a rule for social relationships must wisely be conditioned, and to detail them to the court from which he asks the rule. But that much, certainly, can be done in the schools of law. Even the pecuniarily poorest school can teach its graduates that courts "when they must or when they dare" do determine controversies as policy, not precedent, dictates. And if a school does that, it must also teach them that the policy should be calculated from information carefully furnished to the court, not evoked from judicial intuition.

That the fields of knowledge necessarily to be drawn upon for wise decision are unlimited is obvious. A judicial declaration of "legal negligence"[25] in a bridge or building construction case may call for careful instruction in the science of stress and strain. In patent cases the courts themselves have been known to lament the absence of understandable instruction.[26] In one water-power case the state supreme court learnedly

one class of rights today and another tomorrow, and if it can be sanctioned under the Constitution, while far removed in time we will not be far removed in practical statesmanship from those ages when governmental prefects supervised the building of houses, the rearing of cattle, the sowing of seed and the reaping of grain, and governmental ordinances regulated the movements and labor of artisans, the rate of wages, the price of food, the diet and clothing of the people, and a large range of other affairs long since in all civilized lands regarded as outside of governmental functions." A prescient, even if futile, protest!

23. *Burns Baking Co.* v. *Bryan*, 264 U. S. 504 (1924).

24. Curtis Bok, *Backbone of the Herring*, p. 143. (Knopf: 1941).

25. Such as the Supreme Court laid down in *Baltimore & Ohio R. Co.* v. *Goodman*, 275 U. S. 66 (1927). "In an action for negligence the question of due care is not left to the jury when resolved by a clear standard of conduct which should be laid down by the courts." A comment, 26 Mich. L. Rev. 582, mildly intimates that possibly the court in that instance failed to appreciate the actual operative effects of its decision was uncomprehending of all the material facts.

26. *e.g.*, *Am. Stove Co.* v. *Cleveland Foundry Co.*, 158 Fed. 978 (1908), "This prolixity seems not so much the fault of the witnesses as a mistake of the counsel."

"I was once deeply interested in a patent case, and sat in the court as auditor and spectator. It became clear to me that no member of the counsel on either side understood the technological issues involved. Both sides had experts, of high paper qualifications but uncertain real qualifications. The judge was wholly bewildered, and his rulings were desperate and often fantastic." Alvin Johnson, "A Lay View of Legal Education." 43 Colum. L. Rev. 462 (1943).

discussed the amount of flow through 10 inch openings having rounded edges as compared with the flow through similar openings of square edge.[27] If such matters were a problem merely of expert witnesses, counsel would need to know only his legal rule and principle. But I have heard one of the best known expert witnesses in hydraulic problems complain that if he could find a trained lawyer reasonably versed also in the science of hydraulics he could assure that lawyer retainers for the rest of his life, helping to fit expert knowledge into judicial needs. To get such data clearly to a jury, or a judicial trier of fact, is difficult enough; to get them before appellate judges who are formulating not an "isolated doom," but a declaration which will stand as a "rule" for the future, is doubly difficult—and doubly important.

Outside the field of physical science the judicial need for knowledge is, of course, equally exigent. When the Supreme Court decided that there was an economic evil in contracts fixing resale prices, it purported, at least, to know something of the economic effects of such contracts. When a Connecticut court departed from the English rule of fencing cattle in, and held that Connecticut conditions required fencing them out, it asserted a knowledge of farming conditions and the relative merits and necessities of cultivation versus cattle raising.[28] When some court of equity "balances the equities" in suit for injunction against a smelter stack, it necessarily should be, though it not always is, thoroughly conversant with the relative values to the community of agriculture and smelting.[29] Judges determining the "due process" of restrictions upon tenement house activities must know more of tenement conditions than can be obtained from the street; they need, moreover, realization of what effect those conditions have upon health and morals, and the effect of those effects far outside the tenement district. I need not, I think, amplify the thesis; its truth seems evident.[30]

Education of Lawyers Must Be Broad Enough to Aid Judicial Law-making

Where, then, shall the lawyers from whom the courts may fairly expect this instruction in hydraulics, in tenement-house evils, in all the facts of life, themselves obtain it? Obviously no one man even in the intellectual uplands of the legal profession could be expected to possess, or even to comprehend it all. But for lawyers as a group to know and comprehend a great deal is measurably possible; just as no lawyer is an expert in every field of the law itself, yet every field has its experts. That, in turn, means that however narrowly the extra-legal education of any one lawyer be limited, the extra-legal education of lawyers in general must cover the widest possible scope of knowledge pertinent to wise judicial law-making.

Law schools can not furnish that scope of education; so much may be conceded—must be conceded. The grave danger is that law schools, unable themselves to furnish it, may fail to realize its necessity, and in that lack of comprehension may preclude its attainment elsewhere. Nor is that a danger conjured out of imagination—a mere conceivable improbability. On the contrary, it already looms large, now, in the tendency of law schools either to stipulate narrowly what fields of pre-legal education will be acceptable for admission, or to undertake themselves the function of training in extra-legal fields.

That a law school might reasonably refuse pre-legal credit for courses in horseback riding or calisthenics I should not dispute. But the potential danger lies in their insistence on accounting at the sacrifice of geology, on sociology instead of hydraulics, on constitutional history instead of the history of trusts, pools and corporations, on Latin instead of finance or geography. It may be sound enough to say to prospective lawyers that certain educational attainments are more likely to be of value to the average lawyer than are other subjects. Myself, recognizing, of course, the exception of extremes, I am dubious of even so much. But certainly no law school teacher, or group of teachers, can justifiably limit, or even recommend the limitation, of extra-legal, pre-legal, education of lawyers in general to any fixed field of prescribed subjects. Extra-legal education of the profession as a group can not safely be narrower than the whole field of potential judicial lawmaking.

Law Schools Cannot Alone Give Necessary Breadth to Extra-Legal Education

An equally serious threat to the necessary breadth of extra-legal education is the persistent suggestion that the law schools themselves take it over.[31] No proponent thereof assumes, I judge, that those extra-legal subjects of economics, sociology, history, or whatever might be offered, would be taught, or could properly be taught, by the law-trained experts of the usual law school faculties. The proposal must assume the addi-

27. *Vermont Shade Roller Co.* v. *Burlington Traction Co.* 102 Vt. 489, 150 Atl. 438 (1930).

28. *Studwell* v. *Rich*, 14 Conn. 292 (1841).

29. *Bliss* v. *Anaconda Copper Mining Co.*, 167 Fed. 342 (1909)

30. In *Orr Cotton Mills* v. *St. Mary's Hospital*, 26 S. E. 2d 408 (S. C. 1943), the court approved an injunction against insistence upon an employer's acceptance of partial assignments of wages. The court recognized the prevailing rule of equity that partial assignments are valid if they do not work a substantial hardship on the debtor. But the court took notice also of the existing labor shortage in office help, of the great burden of clerical work necessitated by new laws, and of other existing social conditions, and refused to apply that general rule. The decision, though relatively uncomplicated in its bases, is a clean cut illustration of the influence of socio-economic conditions upon wise decision—not all of which conditions a court could be expected to realize from its own untutored observations.

In *Commonwealth* v. *Keenan*, 33 A 2d 244 (Pa. 1943), the Pennsylvania Supreme Court granted mandamus directing common pleas Judge J. Hilary Keenan to decide cases heard by him and said, "This court takes judicial notice of the 'illness' pleaded by Judge Keenan. What is so well known as to be incontestable need not be pleaded formally. We adjudge the 'illness' pleaded to be of such a self-inflicted nature as to afford no excuse whatever. . . ." Query: Did the court know this of its own observation or did the attorney general adduce it?

31. See Katz, "A Four Year Program for Legal Education," 4 U. of Chi. L. Rev. 527 (1937).

tion to those faculties of instructors particularly equipped for the purpose; not lawyers teaching economics and history, but economists and historians teaching under law school auspices. Perhaps it could be better done in that way than in the colleges themselves, as sometimes alleged;[32] I do not know. But I am highly sceptical of the end product if it were so done. Inevitably, however unconsciously, the content of the courses, influenced by law school administration and law school traditions, would gravitate toward economics and sociology as revealed in legal decision—a consummation devoutly to be deprecated.

What particular *legal* subject matter should be dealt with in law schools and how it should be handled is admittedly a difficult problem. I flatly disagree with Karl Llewellyn's flamboyant declaration that all our law schools "are shabby and silly" and that "not one per cent of instructors know what they are really trying to educate for."[33] The disputation of law teachers over proper allocation of available time between Labor Law, Administrative Tribunals and the older topics; their questioning of case-method, "practical" procedure, and the other arts or content of instruction are a healthy indication that they, with the advice of practitioners, can maintain a running solution of the problem. But for the law schools, even if not the law teachers, to take over the job of extra-legal instruction would probably derogate from the content of that instruction and inevitably limit its scope. Extra-legal education would necessarily be confined to the few subjects taught in the law school—an evil quite as dangerous as refusal to accept any but limited subjects as a basis of admission.

Even more dangerous in its effect on wise judicial law-making, because even more definitely restrictive of extra-legal education, is the proposal to lengthen the period of instruction in "law" at the sacrifice of instruction in those arts and sciences which should be the basis of all law. After all, what judges do, or should do, with the assistance of other lawyers, is to adapt established rules and principles for the governance of social human conduct to the deduced desiderata of existing conditions. Were they, and their advisers, trained *only* in the learning of legal rules and principles, they might fairly be suspect as most uneducated men of learning—" '*Omnium doctarum indoctisimum*,' for the most part, as Erasmus long since styled them."—;[34] not fitted either to comprehend the realities of existing conditions or to deduce the desiderata wisely. I concede, of course, that the two types of education—in law, and in the proper bases of law to be—must be somehow apportioned; but the illustrations which abound indicate that danger threatens far more seriously from too little ability to guide policy-choosing wisely, than from too little knowledge of prior decision.

The Mechanics of Placing Before Judges the Data for Judicial Law-making

The mechanics of getting information before the judges—of whom, however educated, omniscience can not be expected—were partly solved, three decades ago, by Mr. Brandeis as attorney for the state in *Muller* v. *Oregon*.[35] The problem was the constitutionality of Oregon's new statute restricting the employment of women in industry. Opponents of the law contended that "there is no necessary or reasonable connection between the limitation prescribed by the act and the public health, safety and welfare"—an issue not of "law" in any sense, but squarely of facts and the fair deductions therefrom. But how was the court to learn those facts? One could not assume that judges, even of the highest intellectual caliber, would know them without instruction. Nor did Mr. Brandeis so assume. Instead, he filed with the court a brief with "extracts from over ninety reports of committees, bureaus of statistics, commissioners of hygiene, inspectors of factories, both in this country and in Europe, to the effect that long hours of labor are dangerous for women, primarily because of their special physical organization. . . . Following them are extracts from similar reports discussing the general benefits of short hours from an economic aspect of the question. . . ."

Brandeis himself knew enough of physiology, economics and the other pertinences to grasp the true issue and to see its solution through the data to be found in those fields. He was ingenious enough to get them before his judges. They, in their turn, evolved a rule of evidence—or at least applied an established one to the novel situation—saying, "We take judicial cognizance of all matters of general knowledge"—knowledge admittedly brought to their attention through the efforts of counsel.

Just why this example was ignored, and why the clear judicial suggestion—we will heed all matters of general knowledge you present—fell upon deaf ears I do not know. Certainly the example and the invitation were not put to profit in the cases of resale price fixing, of use of evidence obnoxiously obtained, of insurance liability of food purveyors, or in the scores of other cases whose wise decision has depended upon knowledge of more than legal precedents. Perhaps the echoes

"In recent years a tendency toward increasing the (law school) course to four years has appeared, and it can not be doubted that such a change would have important potential advantages." S. P. Simpson, 51 Harv. L. Rev. 965, 970 (1938).

32. *e.g.*, "The intellectual pace in many American colleges is such that men take four years to do work which could be done, and done well, in three, and thus develop habits of indolence which seriously hamper their law school careers." S. P. Simpson, 51, Harv. L. Rev. 965, 971 (1938).

33. 35 Colum. L. Rev. 652, 653 (1935).

34. Letter from John Evelyn to Dr. Nicholson, Nov. 10, 1699. Hist. MSS. Com. VIII, 3, 8.

35. 208 U. S. 412 (1908).

which should have reverberated from *Muller* v. *Oregon* simply could not penetrate the earmuffs of convention.

Judges May Seek Information When the Lawyers Fail

But when lawyers, unalert to their opportunities, fail the courts, can not judges themselves seek information elsewhere? They realize, many of them, that more knowledge than they themselves possess is necessary to wise decision. The possibility of obtaining it elsewhere when counsel fail was suggested by one of the greatest judges, Cardozo, when he wrote, "There is constantly increasing need for resort by the judges to some fact finding agency which will substitute exact knowledge of factual conditions for conjecture and impression."[36] Two years later a clear sighted law school dean proposed a means for effectuating that suggestion:

> Why should not a few of our stronger law schools enter the field? A legal research bureau established in connection with such schools might conduct researches in the legal and economic or other fields concerned in legislation under review by the courts, and upon request or suggestion by the court furnish valuable studies to those tribunals in the performance of their delicate and difficult task. Such a bureau should be composed of lawyers trained in the work of investigation, and their staff should include economists, sociologists, accountants and statisticians, to investigate whatever province of knowledge may be indicated in relation to the matter before the court.[37]

The procedure of getting the information they need —whether they insist on its production by counsel, or utilize some fact finding agency—is of course a problem for the courts. But that they must have the information if their law-making is to be sound is indisputable; that, in time, they can get it if they insist is scarcely questionable.

Conclusions As to the Needed Scope of Legal Education

What I have said at length amounts, in short, to no more than this:—

Law schools must, with care against extremes, foster in their graduates a realization that wise judicial decision is not a matter of precedent and principle only, but is an adaptation of the past to the present: is repudiation of the obsolete; is promulgation of the new; all done in the light of knowledge of whatever facts, in science or philosophy, are pertinent.

Collegiate education, as opposed to mere law school training, must be encouraged; broadened, not limited; advocated in any and every field possibly involved in controversial social relationships, as an assurance that lawyers as a group will be equipped to bring the data for wise decision before the judges.

Courts themselves, as they undoubtedly have power to do, must insist on having that information, either from the lawyers who advise them in a particular case, or from other agencies established by the courts themselves.

Have I no more than expounded the evident and elaborated the obvious?[38] I would think so myself were it not for the persistent disregard by advocates before the courts of Mr. Brandeis' example in *Muller* v. *Oregon;* if it were not for their continuing neglect to advise the courts of all the facts upon which wise decision should be predicated; if it were not for the failure of courts, even within the year, to insist upon obtaining all possible information of social, economic, practical conditions and needs; if it were not for the repeated suggestions that law schools increase the time devoted to study of "law" at the sacrifice of educational time available for other learning.

Despite any political theory of separate agencies in a tripartite government, our judicial department does legislate; its judges at times play also the part of statesmen. And were they educated only in law schools, were they to rely in their decisions upon principle and precedent alone, it would be as true now as three centuries ago that "Knowledge of the Common Law doth not conduce to the making of a States-man: It is a confined and topical kind of Learning. . . . Transplant a Common Lawyer to Calice, and his head is no more useful there than a sun-dial in a Grave."[39]

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36. Cardozo, *The Growth of the Law*, p. 117 (1924).

As this is written, the press carries word that the Supreme Court has declined an offer by Representatives Hatton Sumners and Charles LaFollette and Senator Joseph O'Mahoney to argue as *amici curiae* the application of the Sherman Act to insurance companies. Without intimating that the offer could properly have been accepted, it may fairly be suggested that the problem is one whose solution ought not to rest only upon judicial precedent and what additional knowledge of actual conditions the judges themselves may already possess.

37. Henry M. Bates, "The Courts and Unconstitutional Legislation, A Suggested Aid in the Work of Judicial Review," 5 Neb. L. Rev. 101 (1926).

38. "In general let it be said that the lawyer's range of knowledge should be as broad as it is humanly possible to make it—the broader the better." Stason, "Suggestions to College Students," 1940.

39. John Cooke, *Vindication of the Professors and Profession of Law*, p. A4 (1644), quoting from an anonymous poster protesting the election of lawyers to the House of Commons.

WE should help to so crystallize America's public opinion that, when the time comes for the peace to be written, the men who speak for us in high places can know without question the will of America's people and knowing that will speak with the confidence of the power of a great nation.

ROBERT G. SIMMONS

Chief Justice
Supreme Court of Nebraska

THE POST-WAR LAWYER

By DONALD R. RICHBERG

Of the Illinois and District of Columbia Bars

NEARLY thirty-five years ago a young lawyer wrote an article on "The Lawyer's Function," which was published in *The Atlantic Monthly* in October, 1909. He irritated some of his contemporaries by trying to answer the question: When is a lawyer a harmonizer and when a parasite? He thought the question was important because, he wrote, "in the long run humanity manages to exterminate the parasite, and the survival of the legal profession and the perpetuation of honest pride in this occupation must be entirely dependent on what lawyers give to society in excess of what they take away."

This lawyer is now in his fortieth year of practice. He has represented a great variety of clients, including labor organizations, large corporations, cities, states, and the national government. He has held high public office. He has been occasionally acclaimed and frequently denounced, has known the stimulation of hardship and the enervation of prosperity. This survey of experience will indicate his reason for thinking that it may be worth while today to reconsider the question discussed thirty-five years ago. These thirty-five years have brought to America the airplane, the First World War, the period of National Prohibition, the Great Depression, the New Deal, and the Second World War.

Now it seems well to look ahead and to ask: What service is the American lawyer going to render in the reconstruction of a war-shocked world? It can be assumed that the philosophic, detached members of the profession will recognize that an epochal opportunity for the high service of harmonizers is ahead of them. But will the lawyers who are closely attached to the special interests of valuable clients contribute to the peaceful adjustment of economic conflicts, or will they aid in a brutal clash of embittered partisans?

Popular Distrust of Lawyers

There is historical evidence that popular distrust of the legal profession is characteristic of a revolutionary era. The lawyer is normally a staunch defender of the existing order. At his best, he is seeking to preserve the lessons of experience, the tried and proved methods of settling a controversy and maintaining social order and individual security. At his worst, he is the guardian of persistent inequities and the opponent of progress, the perpetuator of ancient evils and injustice.

The more irreverent leaders of reform, the zealous fighters for the oppressed or under-privileged, become impatient with legal barriers and, in the mood of Dick, the butcher, cry out: "The first thing we do, let's kill all the lawyers." Even more sober reformers may echo a much nobler authority and murmur: "Woe unto you, lawyers! for ye have taken away the key of knowledge."

The saddest effect of this antagonism to trained legal guides is that rash illiterates become the only acceptable planners of a new order, because some form of orderly procedure must be devised for the maintenance of any mechanism of human cooperation. When the counsel of learning and experience is rejected, the experimentation of ignorance, glorified by good intentions, is the most likely substitute. The simple destruction of established rights and obligations is not enough. Inevitably, new freedoms and new responsibilities must be created; but their mere statement is ineffective until procedures are devised to enforce them.

Unemployment is not abolished by a pronouncement that every willing worker shall have an opportunity to earn a living. Freedom from want or fear is not ended by a declaration. Even freedom of speech or the free exercise of religion is not created by a bill of rights. The Supreme Court divides vigorously over the issue as to whether the freedom of Jehovah's Witnesses to deliver their phonographic messages shall be maintained by denying a certain amount of religious freedom to others who are offended by such messages.

Every leader of reform or revolution finds it necessary to create a political, a social and an economic order, with a multitude of rules and procedures for their enforcement. This ought to be the function of persons trained in the law. A government is a mechanism devised and maintained by lawyers, just as a power plant is a mechanism devised and maintained by engineers. Yet, even in this complicated and sophisticated Twentieth Century, there has developed in the United States a strong effort to avoid the use of laws and lawyers in political reform.

Of course many will immediately protest this statement on the ground that laws and bureaus for their enforcement have multiplied at an extraordinary rate

since 1933. But it should be noted that, although the effort to escape from legal restraints has been unsuccessful, the effort has been made. The legalistic result was not intended. It was just inevitable. Once more, as so often in the past, a reforming leadership sought to get rid of the ills of excessive legalism. Once more the reformers superimposed, upon an already complicated machinery of law and order, a much more extensive and complicated machinery of laws and orders.

The Gargantua of Administrative Law

There was a time when the development of administrators and administrative law seemed to offer a useful supplement to the services of the legislative, the executive, and the judicial arms of government. But now we have created a Gargantua of administrative law which is eating up the legislative and the judicial functions and obligations so greedily that popular respect for and support of both are rapidly diminishing.

Observe how the Congress now disposes of a difficult and vital problem of law-making. It enacts a law directing the President to "stabilize" wages and prices. It lays down the vague standard that prices shall be "generally fair and equitable." It does not provide either definite standards or limits of executive action. It allows only a restricted and uncertain judicial review. In plain language, the legislators tell the executives to do what they think is right, to write their own laws and orders and call on the judges to enforce them; and then the judges are told that they should not undertake to review the wisdom or even the legality of what the executives do.

The judiciary, awed by executive power and all too willing to evade responsibility, accepts its minor role with obvious relief. The Supreme Court observes: "Congress has long delegated to executive officers or executive agencies the determination of complicated questions of fact and law. And where no judicial review was provided by Congress this Court has often refused to furnish one even where questions of law might be involved."

Thus, by the device of "administration," it is assumed that inefficiencies, delays, and injustices of a legalistic system have been reformed. "Rigid" statutory law has been made "flexible." The technicalities, dilatoriness, and trickeries of lawsuits have been by-passed. A board or commission of practical men is supposed to make practical rules and to enforce them by summary and informal procedures, granting exemptions from special hardships and dealing promptly and vigorously with wrongdoers and recalcitrants. This is often criticized as a government of men instead of a government of law. But, in fact, it is a government by a multitude of lawmakers unrestrained by established principles of law and law enforcement.

These established principles, however, have not been the cause of dissatisfaction with our legal system. The principles of law-making and of the administration of justice, which have evolved out of centuries of trial and error, are far more fair and workable than any which a generation of rash experimentalists could possibly produce. The defects in our legal system have arisen out of the misapplication, evasion, and neglect of those principles by an increasing number of lawyers in the legislatures, in the courts, and predominantly in active practice.

The principles of the law of evidence are sound guides to distinguish fact from rumor and assertion, and to give appropriate weights to positive and impartial testimony in comparison with that which is negative and self-serving. Ill-trained, unscrupulous lawyers and weak judges discredit these principles and transform a search for truth into a shameful and expensive struggle to conceal or distort facts. Then reform authorizes an administrative commission to receive practically any sort of evidence which may be offered, leaves it to this commonly inexperienced group to do a job of sifting that would tax the powers of an experienced judge, and, finally, makes the findings of fact (and even the conclusions of law) of this body final and not subject to reversal by a court.

There is no doubt that this procedure may result in more accurate determinations of fact than would be expected from an ordinary jury; particularly when a commission is made up of men well-informed regarding the business to be regulated, and after it gains, through long experience, the ability to analyze and weigh evidence. However, not only is a jury subject to the professional guidance of a judge, but the record of a jury trial is subject also to the review of an appellate court which is charged with maintaining the established principles of evidence and procedure and with interpreting and applying the law written in statutes or in judicial precedents.

If the procedures and the regulations of administrative commissions were subject to a similar judicial control, then administrative law would be required to conform to legal principles which have developed out of the long struggle to make government the protector of individual freedom and of orderly cooperation among the interdependent members of a civilized community. It is not only tyrannical but impractical to invest public officials with powers unrestrained by a required conformity with an established philosophy and settled principles of law. Eventually a state must be ruled by personal authority or else by an accepted jurisprudence which is made superior to all individual judgment. There cannot be any lasting authority in the variant theories and orders of a multi-

tude of petty officials free of responsibility to any centralized authority.

Constitutional Bases of Democratic Government

The framers of the American Constitution recognized four fundamental requisites of a democratic form of government. First, the expression of a philosophy of law and the underlying principles of law-making and law enforcement in a Constitution which lays the foundations of a political system. Second, the creation of law-making power in a legislature directly responsive to public opinion. (The original Senate was not a modification of this intention, but a protection of State Sovereignty.) Third, the creation of executive power to enforce law and order through appointive officials who have no part in law-making, excepting the President and the Vice President, who are both elective officers. Fourth, the creation of judicial power, which includes law enforcement and law-making, partly by the interpretation of statutory law and partly by the maintaining and revising of judge-made law.

It is essential to the maintenance of this system of government to restrict the dominant law-making power to those who are selected by popular vote as law-makers. They must remain responsive to public needs and to the public conscience or lose their offices and their authority. The entire design of democratic government depends on restricting executive authority to the enforcement of laws which have been deliberately framed by legislatures so as to establish general rights and obligations. Thus executive favoritism in the grant of special privileges and exemptions is avoided. Thus any exercise of a personal judgment in the control of individual conduct is prevented. Thus the creation of personal authority and dynastic power, based on the capricious distribution of benefits and burdens, is made impossible. Thus individual freedom is preserved from destruction by the arbitrary action of public officials empowered to use police or soldiery to enforce their will as the law.

The Rise and Decline of Judicial Power

The supremacy of legislative power in the United States seemed at one time to be threatened by the widening exercise of judicial power. The judges have always been law-makers; and the growth of the common law showed the need and wisdom of allowing the courts to develop, not only the ways and means of administering justice, but also many of the substantive rights and duties of citizens. Then if judge-made law ran counter to popular judgment, the elected legislators could enact a statute changing the judicial rules or doctrines. But when the judges, as the guardians of constitutional law, developed a tendency to restrain too frequently the legislators, and to exercise a veto power over statutes that had large popular support, there arose a strong demand for a reassertion of the supreme authority of elected law-makers in a democratic government.

Out of this historic controversy came a definite self-limitation of judicial authority. Judges, educated in the principles of political science, recognized that legislative restraints and executive controls which were threatened might seriously impair the independence of the judiciary. In order to avoid this calamity, the courts might well exercise greater self-restraint, even in combatting political experimentation that, in the light of their learning and experience, might seem unwise. So there came a marked recession in the assertion of judicial power, which unfortunately coincided with an extraordinary advance in executive power which proceeded out of unprecedented delegations of legislative power.

The judges had been criticized largely because of their interference with efforts of the legislators to regulate economic conditions by far-reaching controls of private enterprise. Detailed regulation of agricultural and industrial production, of labor conditions, and of business management, seemed necessary to solve distressing problems of unemployment and unprofitable work. Evils, that had been regarded as inevitable or of minor consequence in smaller communities, became intense, gigantic, and intolerable in this modern world in which a great advance in the general welfare was clearly possible. But it was also evident that law-makers could not solve these problems merely by enacting a code of new rights and obligations. A vast increase in the mechanisms and authorities of executive action was required.

The Rising Stream of Executive Authority

The significance of repeated resorts to dictatorships in other countries was not overlooked. Apparently, swift and effective government could be generated by bold executives vested with ample authority and subject to merely nominal control by plodding, confused legislatures and dilatory, cautious courts. And so, while conservatives shuddered, liberals followed radicals in developing a complicated, powerful machinery of administrative law, cheerfully assuring old-fashioned doubters that the underlying structure of democratic government would protect individual freedoms from the potential tyranny of executive officials who were being authorized to regulate the economic life of the whole nation.

This rising stream of executive authority became a torrential flood when the United States actually entered the global war. Now controls that were generally deplored became absolutely necessary: rationing, price and wage controls, the regimentation of industry, the drafting of manpower—all these destroyers of a free economy became the essential means of preserving individual freedom and national existence.

But, looking ahead to the reconstruction of American life, what course will the lawyers advise: Will it be a return to the "wisdom of our fathers"? Will it be acceptance of a new jurisprudence, a slightly modified, slightly liberalized, but still strong executive rule? Will

it be an incoherent, inconsistent hodge-podge of democratic individualism and fascistic socialism?

It is plain that parasitic lawyers will be found on all sides of the great debate. Big business, labor unions, farm blocs, bureaucracies, will all command the pliant services of trained advocates. In public and private offices, in the legislatures and the courts, there will be enough hired brains to insure full consideration of all special interests. But how potent will be the harmonizing lawyers, those whose major interest is in creating a law and order of the Twentieth Century which will serve to advance civilization? Will it be possible, for those who view administrative law as only a branch of executive law, to preserve it from those who see in the "administrator" a combination legislator, judge, and executive, who embodies all the virtues and none of the vices of a benevolent despot?

The Dangerous Choice Between Extremists

There is a clear danger that the extremists will force a choice between the degradation and the exhaltation of administrative law. Either would be a temporary phase of costly error. We cannot fulfill the obligations of a modern government without providing for a more flexible, detailed application of legal rules and standards than can be written into a statute or established by judicial precedents. The need for the exercise of the practical judgment and discretion of administrators in the interpretation and application of regulatory laws is imperative. But law-making should remain firmly in the hands of legislators elected for that purpose. And law-enforcement should remain in the firm control of judges learned and experienced in the principles of administering justice and preserving freedom under law.

This means that, when the law-makers grant authority to administrators to use "reasonable" means to carry out a public policy, the standards of reasonableness must be defined in the statute, and the policy must be declared with a certainty which will make evasion or distortion by a zealous executive a wrongful act and not an exercise of "discretion."

This means that assurance of a prompt judicial review of executive action, to determine whether it is in accordance with substantive law and with procedural fair play, will be provided; but not merely as the means of upholding the authority of the administrator. Judicial review is needed primarily as a guarantee to the individual that legal principles, essential to the maintenance of the public and private rights and obligations of a free people, will be supreme over the personal will of any public official.

Where Will the Post-War Harmonizers Be Found

The post-war lawyers who will aspire to be harmonizers cannot be segregated from parasites simply by the terms of their employment. It is, of course, difficult for the one-client lawyer to free his judgment from the special interest of his client or to discount his own lively interest in the source of his livelihood. But, on the other hand, the lawyer who is struggling to develop a practice also has a strong incentive to find merit in a prospective case without worrying too much about abstract issues of ultimate justice.

The legislator with large groups of class-conscious constituents can easily persuade himself that their special interests are worthy of his staunch advocacy; and thus relieve himself of the burden of statesmanship.

Where may the legal philosopher, the political scientist, the harmonizing lawyer, be found? Will it be in the universities and in the law schools? Ten years ago it might have been generally thought wise to begin the search there. Today there will be doubt in many minds, and violent dissent in many. During the last ten years there has been an exceptional draft of pedagogic brains into public service with both encouraging and disheartening results. The quality of public thinking, and of thinking in public offices, has been definitely improved. But the quality of law-making and administration, although more refined, has deteriorated in many ways. Statutes have been written and administered with an admirable attempt at scientific exactness but with two alarming qualities, a preconceived theory as to what is good for people, coupled with an inflexible program to compel public acceptance of the theory.

These qualities are common and not without value in teachers of law and political economy. It is difficult to inspire students unless there is conviction and enthusiasm in the teacher. These will create fervid disciples and strong-minded dissenters. Such graduates provide an intellectual leadership of great usefulness in a work-a-day world where a large majority have little time or inclination for developing their own ideas on fundamental issues. But the major virtues of political experimentation in a democracy are moderation in the creation of new rights and duties, and flexibility in their application to indeterminate situations and an unconditioned people.

Cocksure Administrators Endanger Necessary Reforms

In order to avoid criticizing others, let me cite the NRA, for which I was in part responsible. The framers were all too sure of their recovery theory and, as administrators, too determined to prove it. When an early public bewilderment and enthusiasm rapidly subsided, and large areas of sullen or angry opposition appeared, the cocksure administrators, enamoured of their own creation, could not reduce the unwieldy project to a practical size and potency, in time to save its inherent values.

In similar fashion, the National Labor Relations Board, the Resettlement Administration and, in war times, the Office of Price Administration, all with

laudable objectives, undertook to accomplish reforms without shrewd concessions to formidable oppositions that might have been conciliated. It is noteworthy that in all these instances the dominating influence of those trained in the schools, over those trained in earning a livelihood elsewhere, all too frequently prevented that harmonizing of opposing interests which is essential to a voluntary, democratic cooperation. One of the wisest scholars in the law, Justice Holmes, pointed out that "the machinery of government would not work if it were not allowed a little play in the joints." The zealous administrator may elevate the moral tone of his governance to the point where intolerance of opposition is mistakenly regarded as a demonstration of integrity of purpose.

The Need for Rebuilding Civilization on Old Ideals

So it appears that we cannot be sure that the harmonizers of the legal profession will come from the universities, the legislatures, the courts or the active practitioners. We are likely to find them in all walks of life and in all ages from idealistic youth to philosophical old age. Always, however, they will be those who have a higher respect for legal institutions than for their own opinions or for any immediate interests. Humility is a rare but valuable quality in a reformer. An understanding that righteous objectives do not justify evil methods is also desirable. The easy-going parasite may do less harm than the intolerant idealist who undertakes to harmonize human differences with a club.

But the need for a vigorous maintenance of proved principles of law-making and law-enforcement has never been more important than it will be when we begin to rebuild a civilization shattered by a world-wide assault upon the idealisms of good faith, good will, individual freedom and service to mankind. The supremacy of laws, and the administration of justice, nurtured in these ideals, is necessary to restore that faith of man in man, that willing exchange of services, that fair play in the struggle of competitors, that has lifted mankind from bestial living into the "statelier mansions" of the soul.

Thirty-five years ago a young lawyer was concerned over the future of his profession. Today he is concerned over a somewhat larger question: Has the legal profession of the oncoming generation been educated to fulfill its high responsibilities or only trained to serve the materialists and self-proclaimed realists who have almost destroyed the great idealism that we call civilization?

THE INTERNATIONAL LAW AND THE FUTURE

THE editorial in our April issue said that the postman would shortly bring you your copy of "The International Law of the Future." It may take a little longer because all along the line there are shortages of material and manpower. Your copy has been printed. The treatise is being bound at the rate of 5,000 copies per week. As rapidly as they are available they are addressed and mailed. Mailing to our membership is in alphabetical order. If you are Mr. Young please do not be angry if your brother-lawyer, Mr. Adams, gets his copy some time ahead of you. Remember that the American Bar Association has more than 30,000 members. And remember that your copy has been marked for you, is on its way from the printing presses to you, and is worth waiting for. Because of the whole-hearted cooperation of our printers and binders it is likely that a great many of you will have received your copy before you even see this notice.

A "CREDO" AS TO THE JUDICIAL FUNCTIONS OF ADMINISTRATIVE TRIBUNALS

THE foremost statesman thus far developed in and by the administrative agencies of the Federal Government was, by general acclaim, Joseph B. Eastman, of Massachusetts, Chairman of the Interstate Commerce Commission and Director of the Office of Defense Transportation, who died on March 15 as a result of overwork in wartime duties. On February 17, the evening before his fatal illness struck him down, this outstanding public servant was the guest of honor at a testimonial dinner given in Washington to commemorate his "silver anniversary" as a member of the Interstate Commerce Commission, to which he had been reappointed from time to time "by Presidents of varying outlook."

After a few pleasant reminiscences of his long service in Washington, Mr. Eastman made a statement of twelve things which he said were the essence of his experience and faith, based on his work in the oldest of the federal administrative tribunals. In its outlook and vital substance, Mr. Eastman's pronouncement for impartiality and fair play was in accord with the spirit and objectives of the American Bar Association's proposed bill for improving administrative procedures. Only in details of emphasis and methods could there be room or reason for divergence.

In any event, his "credo" is a wise and militant declaration of the duty of all concerned to do their part in assuring the fair and impartial discharge of the quasi-judicial duties of all administrative tribunals:

"(1) With the country as big and complex as it is, administrative tribunals like the Interstate Commerce Commission are necessities. Probably we shall have more rather than less. To be successful, they must be masters of their own souls, and known to be such. It is the duty of the President to determine their personnel through the power of appointment, and it is the duty of Congress to determine by statute the policies which they are to administer; but in the administration of those policies these tribunals must not be under the domination or influence of either the President or Congress or of anything else than their own independent judgment of the facts and the law. They must be in position and ready to give free and untrammeled advice to both the President and Congress at any time upon request. Political domination will ruin such a tribunal. I have seen this happen many times, particularly in the states.

"(2) The courts were at one time much too prone to substitute their own judgment on the facts for the judgment of administrative tribunals. They are now in danger of going too far in the other direction. The principle that it is an error of law to render a decision not supported by substantial evidence is a salutary principle. The courts should enforce it.

"(3) An administrative tribunal has a broader responsibility than a court. It is more than a tribunal for the settlement of controversies. The word 'administrative' means something. The policies of the law must be carried out. If in any proceeding the pertinent facts are not fully presented by the parties, it is the duty of the tribunal to see to it, as best it can, that they are developed of record. A complainant without resources to command adequate professional help should be given such protection. The tribunal should also be ready to institute proceedings on its own motion, whenever constructive enforcement of the law so requires.

"(4) There is no safe substitute in the procedure of the tribunal for full hearing and argument of the issues, when they are in controversy, although the hearing need not always be oral. This takes time, but it is time well spent.

"(5) The decisions of the tribunal should present succinctly the pertinent facts, as they are found to be, and the conclusions reached, but also state clearly the reasons for the conclusions.

"(6) The statutes which the tribunal administers should be well, simply and carefully framed, but the personnel which does the administering is more important than the wording of the statute. Good men can produce better results with a poor law than poor men can produce with a good law.

"(7) It is not necessary for the members of the tribunal to be technical experts on the subject matter of their administration. As a matter of fact, you could not find a man who is a technical expert on any large part of the matters upon which the Interstate Commerce Commission finds it necessary to pass. The important qualifications are ability to grasp and comprehend facts quickly and to consider them in their relation to the law logically and with an open mind. Zealots, evangelists and the crusaders have their value before an administrative tribunal, but not on it. Other important qualifications are patience, courtesy and a desire to be helpful to the extent that the law permits.

"(8) Moral courage is, of course, a prime qualification, but there are often misapprehensions as to when it is shown. The thing that takes courage is to

make a decision or take a position which may react seriously in some way upon the one who makes or takes it. It requires no courage to incur disapproval, unless those who disapprove have the desire and power to cause such a result. Power is not a permanent but a shifting thing. I can well remember the time when it was a dangerous thing to incur the displeasure of bankers, but there has been no danger in this since 1932. It became a greater danger to incur the displeasure of farm or labor organizations. There is nothing more important than to curb abuse of power, wherever it may reside, and power is always subject to abuse.

"**(9)** Selection of the members of an administrative tribunal from different parts of the country has its advantages, but they turn to disadvantages if the members regard themselves as special pleaders for their respective sections.

"**(10)** Sitting in dignity and looking down on the supplicants from the elevation of a judicial bench has its dangers. A reversal of the position now and then is good for the soul. It has for many years been my good fortune to appear rather frequently before legislative or Congressional committees. They are a better safeguard against inflation than the OPA.

"**(11)** In any large administrative tribunal, like the Interstate Commerce Commission, a vast amount of the real work must necessarily be done by the staff. It is a difficult problem to give the individual members of the staff proper recognition for work well done—recognition on the outside as well as the inside. It is very important that this problem be solved, but I am frank to say that its full solution has not yet been reached.

"**(12)** One of the great dangers in public regulation by administrative tribunals of business concerns is the resulting division of responsibility, as between the managements and the regulators, for the successful functioning of these concerns. For example, there was a tendency at one time, and it may still exist, on the part of those financially interested in the railroads to think of the financial success of those properties solely in terms of rates and wages and the treatment of rates and wages by public authorities. Sight was lost of the essentiality of constant, unremitting enterprise and initiative in management. The importance of sound public regulation cannot be minimized, but it must not be magnified to the exclusion of those factors in financial success upon which ordinary private business must rely."

Commissioner Eastman was long interested in the American Bar Association, and was a speaker many times before the Association or its Sections. Despite minor divergencies of points of approach or experience, he was the close friend of many members of the Association, who will cherish his "credo" as a fitting summary of a philosophy of fairness and a life work which has so regrettably ended.

An Independent Judiciary the Appropriate Guardian of Private Right

"WHEN the spirit of liberty has fled, and truth and justice are disregarded, private rights can easily be sacrificed under the forms of law. On the other hand, there is weight due to the consideration, that a bill of rights is of real efficacy in controlling the excesses of party spirit. It serves to guide and enlighten public opinion, and to render it more quick to detect, and more resolute to resist, attempts to disturb private right. It requires more than ordinary hardiness and audacity of character to trample down principles which our ancestors cultivated with reverence; which we imbibed in our early education; which recommend themselves to the judgment of the world by their truth and simplicity; and which are constantly placed before the eyes of the people, accompanied with the imposing force and solemnity of a constitutional sanction. Bills of rights are part of the muniments of freemen, showing their title to protection, and they become of increased value when placed under the protection of an independent judiciary, instituted as the appropriate guardian of private right."

James Kent in "Commentaries on American Law"

PRACTISING LAWYER'S GUIDE TO THE CURRENT LAW MAGAZINES

ADMINISTRATIVE Law—"Administrative Control of Oil Production in Texas": What is often referred to as the most powerful state administrative agency in the United States is the Railroad Commission of Texas, which regulates not only the railroads, motor carriers and gas utilities in a vast domain, but also the production of between one-third and one-half of the nation's oil. The drastic character of its powers over petroleum output by private owners is instanced by its now commonplace limitation to a daily output of fifteen to twenty barrels of a great number of wells which could readily produce thousands of barrels each per day. No comprehensive analysis of the Commission's administrative processes having been published hitherto, the story has been put together in the February issue of the *Texas Law Review* (Vol. XXII—No. 2; pages 149-193), by Professor Kenneth Culp Davis of the University of Texas Law School, and Professor York Y. Willbern, of North Texas State Teachers College, now in the Armed Forces. The procedures and policies of the Commission, the defects and the difficulties, are given in critical detail, with considerable discussion of the attitudes and rulings of reviewing courts. The joint authors are of the opinion that in limiting judicial review of Commission orders to the question whether the order is "reasonably supported by substantial evidence before the court," the Texas Supreme Court "has gravely misunderstood this problem" and that "an aggrieved party never does get a fair hearing on the merits of his case" in court, although "The Commission's procedural practices are seriously deficient in many respects." Yet "one seldom hears complaints about a meddlesome bureaucracy interfering with free enterprise." The regulated oil industry "seems on the whole satisfied." Virtually all of the problems inherent in fair standards of administrative agency procedure are adverted to in this notable article, which has its roots deep in seasoned experience. (Address: Texas Law Review, Austin, Texas; price for a single copy: $1.00).

"Administrative Law and the Future"—Rapid Expansion of the Administrative Process in the United States: A practical and illuminating analysis of the trends in administrative law, taken in specific detail and put in perspective, is provided by Carl McFarland, of the District of Columbia Bar, in the February issue of the *Tennessee Law Review* (Vol. 18—No. 2). The discussion (pages 157-177) is replete with the experience of a lawyer who has wrestled with diversified litigation in the field of administrative law, both in high public office and in work for private clients. The footnotes are timely source material on controversial issues. (Address; Tennessee Law Review, No. 720 West Main Avenue, Knoxville, Tennessee; price for a single copy: 75 cents).

Administrative Law—"The Administrative Suspension Order and Its Use by the Federal Emergency Agencies in Regulating Allocations and Rationing": A useful bringing together of the rapidly developing precedents in the

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Editor's Note: **This department of the JOURNAL is intended to provide a means by which the practising lawyer can find out if the current law reviews and other law magazines contain material which might be of interest and help to him in his professional work. Complete coverage of all material of merit in all of the publications is of course impracticable. Selection is made of articles, notes, editorials, etc., which, from the point of view of a lawyer in active general practice, seem likely to be useful perhaps to other lawyers in connection with subjects and questions of law which are current. No assurance can be given that an indicated article, etc., will be found helpful on the particular problem confronting the lawyer. Complete digests of the contents of the law magazines will be found in the *Index to Legal Periodicals*, published by the American Association of Law Libraries.**

Members of the Association who are interested in any of the articles, etc., referred to in this department will generally find the magazine obtainable on prompt request to the address given in parentheses, if accompanied by a remittance of the price stated for a single copy. If this experimental department proves to be useful to lawyers in acquainting them with available material, and it develops that copies of a current magazine listed are unobtainable from the publisher, the JOURNAL will be able to supply, at a price to cover the cost plus handling and postage, a planograph or other copy of any article, note, etc., which is desired. Request should be made first to the particular magazine.

above field constitutes the contribution of Richard H. Keatinge to the January issue of the *Georgetown Law Journal* (Vol. 32—No. 2; pages 152-170). The article deals only with the legality of the suspension orders issued by the emergency agencies as a result of what has been found to be a violation of priority, allocation, or rationing regulations; it does not attempt to discuss the use of suspension orders issued on grounds of violation of price regulations, for which the statutory basis is wholly different and the legislative history makes the questions of their constitutionality more tenuous. Of course, new actions have been taken by the agencies almost weekly in this uncharted field, ever since this article was written; but the initial precedents and the developed issues are well set forth, with a plea in conclusion for taking a "broad or liberal view of the emergency war powers" in support of effective protection of the public interests. (Address: Georgetown Law Journal, Washington, D. C.; price for a single copy: 75 cents).

Anti-Trust Laws—Legal Problems in Standardization and Simplification by Group Action: The manufacture of durable goods in large quantities and for general use long ago made it essential that the products and the parts thereof be largely uniform and largely interchangeable. This process of standardization and simplification has enabled the assembly line and mass production, has vastly decreased unit costs to the public, and has facilitated repairs at points remote from the place of manufacture. As long ago as 1927, the Division of Trade Standards, within the National Bureau of Standards, was established by the Department of Commerce to encourage the voluntary establishment, by industrial groups, of "commercial standards" covering grades, quality, and dimensional interchangeability. A few years ago the Department transferred a great deal of this activity to the American Standards Association, a private and independent body largely of technicians. Company standardization in large units of production was followed in many instances by group standardization, in the parts of industries made up of smaller enterprises, as necessary for their survival. War and the paramount urgencies of war production made further standardization and simplification the price of preparedness and efficiency in warfare. Jeeps and tanks, planes and landing-craft, motors and control valves, trucks and guns, had to be greatly standardized, as to types, specifications, and interchangeability of parts. Pressures for standardization came to industry from many official angles, although in some cases belatedly. In 1942 the War Production Board, the American Standards Association, and the OPA, signed a contract calling for intensive standardization work in connection with war measures, such as the conservation of critical materials. Industry found it could not equip the armed forces in time, if it had to continue the diversities of its competitive output. Within the past month, the Bureau of Standards sent to industry and trade association members another of its questionnaires, obviously in encouragement of further steps for standardization. Technical societies, trade associations, and committees formed under the aegis of the WPB, were aware of the legal risks inherent in group action for standardization; counsel for manufacturers were mostly hesitant; the sanctions and protective assurances received from official sources seemed often to be no more than scant bulwarks against proceedings under the anti-trust laws. Nevertheless, American business men and their lawyers went ahead, took the risks, did the job, did it in time, achieved in many instances through standardization amazing and repeated reductions in unit costs of war materials for the services, and did all this with full recognition that a day of reckoning for their concerted action to meet the national need might be invoked by hostile prosecutors. Against this moving background of facts as current and common as the May calendar, E. Compton Timberlake writes trenchantly in the March issue of the *Cornell Law Quarterly* (Vol. XXIX—No. 3; pages 301-329), concerning the legal problems and risks inherent in group standardization and simplification, in normal times and under the war emergency legislation and procedures, all in view of the provisions of the anti-trust laws and the analyzed decisions. The author was a special assistant in the Anti-Trust Division of the Department of Justice during 1939-42. His conclusions are that standardization and simplification are in themselves legally unobjectionable, but that agreements to adhere to the standards, to make only standard items, or to make only the items in the standard products lines, are probably unlawful restraints of trade, "unless under the peculiar facts of the case they can be justified under the rule of reason," whatever that may be adjudicated to mean in the present tense. He indicates also various particular circumstances in which he believes that standardization "would probably be condemned as part of the unlawful scheme," perhaps even "unreasonable *per se*." He declares emphatically that "there are doubts which should be removed by appropriate legislation concerning the legality of participation in, and acceptance of, simplified practice recommendations." In any event, this article may advisably be read and preserved by lawyers who are advising manufacturers in any line of production, especially those who are members of trade associations or some of whose officers are members of technical societies or WPB or OPA committees. (Address: Cornell Law Quarterly, Ithaca, New York; price for a single copy: $1.00).

Anti-Trust Laws—"Trade-marks and Restraints of Trade"—Use of Trade-marks by "Cartels"—Proposed Federal Legislation as to Trade-marks: The current phases of the above subjects are treated in the January issue of the *Georgetown Law Journal* (Vol. 32—No. 2). Bartholomew Diggins, Special Assistant to the Attorney General, sketches from the decided cases, the legal conse-

quences of the use of trade-mark rights in regulating and restricting competition, and places special emphasis on their use by "cartels," etc. (pages 113-135). His definition and description of the "cartels" and their functioning are graphic and lucid. For those who have need to examine the argument for the point of view taken, his supported conclusion is that "The cases involving restrictive patent practices make it clear that trade-marks do not afford their owners any special immunities from the prohibitions of the anti-trust laws." Harking back to the test declared in 1912 in the *Standard Sanitary* case (226 U. S. 20, 49), the author thinks that "trade-marks will undoubtedly be ineffective, within the United States, to circumvent the public policy which condemns monopolies and restraints of trade." In the same issue (pages 171-182), James Fay Hall, Jr., analyses the "Possible Monopoly Implications in the Lanham Trade-mark Bill" (H.R. 82—78th Congress, 1st Sess.—1943). (Address: The Georgetown Law Journal, Washington, D. C.; price for a single copy: $1.00).

Civil Practice—Trials—Continuances in Mississippi State Courts Because of Absent Witnesses or Documentary Evidence: To the January issue of the *Mississippi Law Journal* (Vol. XVI—No. 2), Mr. Vardaman Dunn, of the Hinds County Bar in that state, contributes a comprehensive discussion of the rules and considerations governing the right of litigants in its state courts to a continuance of trials. (Address: Mississippi Law Journal, University, Mississippi; price for a single copy: 75 cents).

Civil Practice—"Modernized Civil Code of Missouri": *The University of Kansas City Law Review* contains, in its December-February issue (Vol. XII—No. 1), an authoritative and comprehensive article on the new Civil Code in Missouri, which became law by the signature of Governor Forrest Donnell on August 6, 1943, and will go into effect on January 1, 1945. The author is Charles L. Carr, who lectures on evidence in the Kansas City Law School and was the chairman of the Legislative Committee of the Kansas City Bar Association, which committee took part actively in the formulation of this much-debated new Code and in bringing about its enactment as the result of some four years of study, discussion, and advocacy in the forum of public opinion. For future interpretation of the origins and intent of provisions of the Code, Mr. Carr's contribution will be source material. (Address: University of Kansas City Law Review, Kansas City, Missouri; price for a single copy: 75 cents).

Civil Practice—"Missouri's New Civil Procedure—A Critique of the Process of Procedural Improvement": A more critical view of Missouri's new Civil Code and the process of its enactment is taken by Professor Thomas E. Atkinson, of the University of Missouri Law School, in the January issue of the *Missouri Law Review* (Vol. IX—No. 1). The author, who was technical adviser to the Missouri Supreme Court Committee on Civil Procedure (1940-43), points out that "the Code deals only with civil procedure and indeed leaves a large part of that field unaltered." The stated purpose of his pragmatic analysis is to show: "(1) How far the Code failed of the original purpose of the undertaking, viz., to modernize Missouri procedure and to expedite and reduce the costs of trials and appeals; (2) how far these failures may be remedied by rules under the terms of the Code; (3) how a brighter future for the administration of justice can be assured through an improved method of procedure-making." The whole article is a vivid chronicle of "democracy at work" in a modern state, so narrated that he who runs may read and he who reads may run and try to avoid the same obstacles to procedural reform in his own commonwealth. The variances of viewpoint and "vested" interest in familiar routines, which arose between the bench, the bar associations, the law schools, many of the practicing lawyers outside the bar associations, members of the legislature, and lay organizations and groups, are trenchantly traced, with ample documentation. Many of the eliminations, made from earlier and hopeful drafts, by the Missouri Supreme Court or by one house or the other in the state legislature, are pointed out as regrettable. Contrasts are drawn with the new Federal Rules of Civil Procedure. As between the Missouri Supreme Court and the Legislature, Professor Atkinson declares that "There probably will be finger-pointing at both bodies, but the blame should be attached to the method which produced the Civil Code." The article is a demonstrative plea for "complete and unhampered judicial rule-making", though it is conceded that acceptance of even the court's suggestions would have left substantial difficulties. Its conclusion nonetheless is that "a constitutional provision for general super-statutory rule-making is the best method of preserving the courts for litigants and litigants for the courts." Charles L. Carr, of the Kansas City Bar Association, writes in the same issue in a more favorable and hopeful vein regarding the probable accomplishments by the new Code. (Address Missouri Law Review, Columbia, Missouri; price for a single copy: 85 cents).

Civil Practice—Federal Courts—"Federal Question Jurisdiction and Section 5" of the Act of March 3, 1875: Jurisdiction based on the presence of a "federal question" is perhaps the most important branch of federal jurisdiction. At times it has seemed to be one of the most confused. In April of 1942, Professor Ray Forrester, of the Tulane University College of Law, published in the *Tulane Law Review* an article on "The Nature of a 'Federal Question.'" This was interestingly reviewed by Professor Sears in our department devoted to current legal periodicals (28 A.B.A.J. 772). There had been no comparable discussion of the field since

1911. By an unusual coincidence, a contribution on the same subject, by Messrs. Chadbourn and Levin, appeared, also in April of 1942, in the Pennsylvania Law Review (90 Pa. L. Rev. 639). Although the two articles were in agreement on the more fundamental aspects of the problem, they did not agree on all issues, and particularly as to the significance of Section 5 of the Act of March 3, 1875. Professor Forrester, who was associated with the Chicago law firm of Defrees, Buckingham, Fiske & O'Brien during 1935-41, resumes his consideration of Section 5 in the December (1943) issue of the *Tulane Law Review* (Vol. XVIII—No. 2; pages 263-288). His thesis is that "federal question" jurisdiction needs considerable further study, by lawyers and judges, and that even Mr. Justice Cardozo in the *Gully* case (299 U. S. 109) failed to see that what Professor Forrester regards as the fundamental confusion in this field arose from a misreading of the famous *Osborn* case (9 Wheat. 738), in which Chief Justice Marshall first set forth the general rule. Without acceptance of all of the author's present conclusions, it may be said that this article is one which a federal practitioner will do well to have in his files, for reference as need arises. (Address: Tulane Law Review, New Orleans, La.; price for a single copy: $1.00).

Constitutional Law—Validity of State Legislation—"Unconstitutional Legislation in Mississippi": The January and March issues of the *Mississippi Law Journal* (Vol. XVI—Nos. 2 and 3), which is the journal of the Mississippi State Bar, contain the two installments of an amply annotated thesis on "Unconstitutional Legislation in Mississippi," by Huey B. Howerton, head of the Department of Political Science in the University of Mississippi. Practically every phase of the attacks made on the validity of state laws in that commonwealth, and the grounds of judicial decision, is exhaustively treated. Lawyers who may have occasion to advise or litigate as to the constitutionality of Mississippi laws will be pleased to have these articles in their files. (Address: Mississippi Law Journal, University, Mississippi; price for a single copy of each of the two issues: 75 cents each).

Contracts—Compromise of Contract Claims—A Criticism of Tanner v. Merrill (108 Mich. 58): An examination of the reviews published under the auspices of the many law schools leads to an awareness that a decision by the highest court of law in one state is sometimes subjected to considered analysis and criticism in a law review in a distant state, particularly in respect of the attitude of the courts generally towards applying or extending the doctrine of the case. The much-discussed decision long ago in *Tanner* v. *Merrill* (108 Mich. 58; 65 N.W. 664), as to the effect of what is referred to as a "compromise" or settlement of a debt or claim of a disputed amount, receives such treatment in a "student note" by Roxanna Blake in the January issue of the *Kentucky Law Journal* (Vol XXXII—No. 2; pages 202-207). The trends of differentiation, in states which at least ostensibly follow *Tanner* v. *Merrill*, are given; and the conclusion is suggested that "the principal case rests on a doubtful legal basis." (Address: Kentucky Law Journal, Lexington, Kentucky; price for a single copy: $1.00).

Corporations—Stockholders—Public Utility Holding Company Act—"The Relative Rights of Preferred and Common Shareholders in Recapitalization Plans under the Holding Company Act": A most timely assembly and analysis of the decisions of the Securities and Exchange Commission and the courts on the above subject is contributed to the January issue of the *Harvard Law Review* (Vol. LVII—No. 3; pages 295-327), by Professor E. Merrick Dodd, of the Harvard Law School. It centers on the very difficult and important questions of law as to the extent to which the absolute priority rule of the corporate reorganization cases is applicable to recapitalization plans submitted to the Commission under Section 11 of the Public Utility Holding Company Act. Commissioner Healy's dissenting views, in the *Federal Water Service Corporation* case (8 S. E. C. author is of the opinion that, as to the Commission, "One can criticize its methods if he believes that better can criticize its methods if he believes that better methods can be devised." His conclusion, however, is that "the question of the method to be used in reaching conclusions about future earning prospects, as distinct from the question whether preferred shares ought as a matter of law to be treated as though they were matured debts, is one which should not be decided by the courts, but by the body of administration experts to which Congress has entrusted the problem." (Address: Harvard Law Review, Gannett House, Cambridge, Mass.; price for a single copy: 75 cents).

Federal Taxation—Concepts of the "Income" of Individuals: The March issue of the *Canadian Bar Review* (Vol. XXII—No. 3—pages 253-263) contains "Taxation Decisions and Rulings," as assembled by J. S. Forsyth, of the Ottawa Bar. The principal feature is an analysis of the history of the concept of "income" under the tax statutes of Canada, which at times have been derived in part from the revenue laws of the United States. Lawyers who wish to examine the analogies and contrasts of the inclusions and exclusions made in the Canadian interpretations may find this material interesting. The same department also contains notes as to the Canadian Excess Profits Act of 1940 and the Dominion's limitations on charitable contributions (Address: Canadian

Bar Review, Room 816, Ottawa Electric Building, Ottawa, Ontario, Canada; price for a single copy: 75 cents).

International Law—"The Status of the Irish Free State in the British Commonwealth of Nations": A really distinguished article on the above subject is contributed to the March issue of the *Canadian Bar Review* (Vol. XXII—No. 3—pages 183-195), the journal of the Canadian Bar Association, by Joseph Sweeney, of Mt. Rainier, Maryland. In its "Dominion status," the Irish Free State is shown to be "one of the so called 'equal States' of the British Commonwealth of Nations," but the "evolutionary" process by which the other Dominions have achieved measurable autonomy and independent sovereignty was not followed by the Irish Free State, which resorted instead to "revolution and an international treaty" and only reluctantly acceded in 1921 to an ostensible "Dominion status," as the last member of the British Commonwealth to be accorded that constitutional status. The developing attitude of the De Valera government in and toward the Imperial Conferences is traced, and analogies are drawn as to Canada's autonomy under the Statute of Westminster. The conclusions arrived at on the controversial issue of "secession" are adverse to the claimed right of Eire to withdraw from the confederation. At a time when the status of South Africa, India, Australia, and even Canada, within the Empire, is undergoing a re-examination, and when proposals for new cooperations of sovereign nations are being urged, this realistic study of the status of the Irish Free State is worthy of considered perusal, by students of international relations and by lawyers who have problems in which that status may be a factor. (Address: Canadian Bar Review, Room 816, Ottawa Electric Building, Ottawa, Ontario, Canada; price for a single copy: 75 cents).

Medical Jurisprudence—Relation of Emotions to Injury and Disease—"Legal Liability for Psychic Stimuli": The March issue of the *Virginia Law Review* (Vol. 30—No. 2) contains a companion article to that reviewed in our April issue (page 205). The first article in this unique study (Vol. 30—No. 1) comprised ninety pages and was written jointly by Hubert Smith, associated in medical-legal research at Harvard University, and Dr. Harry C. Solomon, Director of the Boston Psychopathic Hospital. This was probably the first time that an eminent lawyer and an outstanding psychiatrist have pooled their efforts to produce, for the assistance of lawyers and judges, an original and exhaustive analysis of a very practical legal problem. The companion article in the March issue contains 120 pages and is by Mr. Smith and the well-known Dr. Stanley Cobb, professor of psychiatry at the Harvard Medical School. It blends scientific proof with current legal doctrine on the important practical question of liability for compensation for tangible mental or physical disability, when suffered solely through the internal operation of psychic stimuli culpably caused by the conduct of another. The law, the decisions and the psychiatric phases, are presented in an authoritative manner. Lawyers who have occasion to deal with these subjects will find it helpful to have these two articles in their files. (Address: Virginia Law Review Association, University of Virginia, Charlottesville, Virginia; price for the two issues: $1.25 per copy for each).

Negligence—"A Rationale of Criminal Negligence": The November, January and March issues of the *Kentucky Law Journal* (Vol. XXXII—Nos. 1, 2, and 3) contain a noteworthy presentation by Professor Roy Moreland of the University of Kentucky College of Law, as "A Rationale of Criminal Negligence." The articles were doubtless planned and written as a contribution to legal scholarship, rather than as a compendium for the assistance of practising lawyers. They offer, however, what their title denotes; they bring together and try to put in place the decided cases in a field of law which never has been too well charted, amid the accelerated complexities of modern mechanisms and relationships. If a lawyer is in need of thinking through a specific case as to what negligence is criminal, and may perhaps have to break new ground in prosecution or defense, he is likely to find this series at least provocative. One cannot help hoping that Professor Moreland will some day write a supplement adapted for a lawyer's perusal during the night or day before he calls his first witness in a case involving criminal negligence. (Address: Kentucky Law Journal, Lexington, Kentucky; price for a single copy of each of the three issues: $1.00 each).

Public Utility Law—"Status of Regulatory Commissions Under the Hope Natural Gas Decision": The starting-point of the timely article contributed by Francis X. Welch, of the District of Columbia Bar, legal editor of the Public Utilities Reports, to the January issue of the *Georgetown Law Journal* (Vol. 32—No. 2; pages 136-150) is that the regulation of public utilities in the United States "has now run the full course of domination by the three constitutional branches of our Federal Government." The first was the legislative phase exemplified and set in motion in 1877 by *Munn* v. *Illinois* (94 U. S. 113). The second ascendancy was that of the judicial branch, ushered in by *Smyth* v. *Ames* (169 U. S. 466) in 1898. The third and present phase is the administrative control, declared by the Supreme Court on January 3, 1944, in *Federal Power Commission* v. *Hope Natural Gas Company* (—— U. S. ——). From a point of view avowedly hopeful as to the new "masters of public regulation," the author depicts the land-marks of the intervening decisions, as background for a penetrating forecast of the scope and significance of the latitudes and immunities accorded to regulatory tri-

bunals by the latest ruling of the majority in the Court. (Address: The Georgetown Law Journal, Washington, D. C.; price for a single copy: $1.00).

Taxation—State Levies on Corporations—The Wisconsin "Privilege Dividend" Tax: Those lawyers who, without previous experience as to the particular impost, find themselves and a corporate client in a quandary over the Wisconsin "privilege dividend tax" (Wisconsin Laws of 1935, Chapter 305, Section 3), will derive consolation as well as assistance from the article contributed to the Winter (1944) issue of the *Marquette Law Review* (Vol. XXVIII—No. 1) by William Smith Malloy, of the Wisconsin Bar. It will be recalled that the constitutionality of the tax as to Wisconsin corporations was quickly upheld (*State ex rel. Froedert Grain and Malt Company* v. *Tax Commission* [1936], 221 Wis. 225, 265 N. W. 672). The validity of its application to foreign corporations doing business in Wisconsin was presented in *J. C. Penney* v. *State of Wisconsin* (1940) (233 Wis. 286, 289 N. W. 677). The state supreme court held the tax to be in nature an excise tax on the privilege of receiving a dividend, and so held it unconstitutional, on the authority of the then recent decision in *Connecticut General Life Insurance Company* v. *Johnson* (1938) (303 U. S. 77), as attempt to tax an act which takes place outside of the taxing jurisdiction. The Supreme Court of the United States, by a vote of five to four, upheld the tax, after expressly disregarding the state court's characterization of its nature—(311 U. S. 435). "The Supreme Court was not asked to construe the statute," said the Wisconsin Supreme Court, on remander. "That is a matter under the decisions of the Supreme Court which is clearly a function of this court, and we must assume that the Supreme Court of the United States made its decision in recognition of that fact. We are bound by its decision and we yield to no other." Mr. Malloy thinks that "The implication of the Wisconsin Supreme Court's remarks is that the United States Supreme Court had extended its powers in a manner never foreseen by Justice Marshall when he wrote the opinion in *Martin* v. *Hunter's Lessee*, and in a manner not necessary to keep the Federal Constitution the supreme law of the land." The state courts and taxing authorities in Wisconsin have since proceeded on the basis that the United States Supreme Court upheld the constitutionality of the tax *as construed by the Wisconsin Supreme Court;* viz., as a state tax on transactions beyond its borders. "Rectification can only be made by the Supreme Court of the United States by a decision on the constitutionality of the measure *as interpreted*," says Mr. Malloy. "It would seem that certainty in the law would demand submission of the question at as early a date as possible." The questions discussed in the article have broader interest than the particular state and tax involved, inasmuch as Mr. Malloy points out that the decisions regarding this tax have made it "the seeming ultimate expression of the power of a state to tax without running afoul of constitutional restrictions." (Address: Marquette Law Review, Milwaukee, Wisconsin; price for a single copy: $1.00).

Trusts—"The Texas Trust Act" of 1943: The little-heralded Trust Act of the State of Texas, effective April 19, 1943 (Texas Acts 1943; ch. 148, Section 1, carried as Art. 7425b. in Texas Stat. [Vernon, Supp. 1943]), is extensively explained and annotated in the February issue of the *Texas Law Review* (Vol. XXII—No. 2; pages 123-145), by R. Dean Moorhead, Assistant Attorney General of Texas. Prior to the passage of this Act, statutes dealing with express trusts were virtually non-existent in Texas. The new legislation seems to lean heavily on the American Law Institute's Restatement as to Trusts; it is not in all respects an adoption of the Uniform Trusts Act drafted by the National Conference of Commissioners on Uniform State Laws. The statutes of various states, perhaps notably Oklahoma, and the Uniform Trusts Act, contributed substantially to some of its provisions. (Address: Texas Law Review, Austin, Texas; price for a single copy: $1.00).

Trusts—Uniform Trust Receipts Act—Priority Between Successive Holders of Trust Receipts Under the Act: Editorial comments in the March issue of the *Chicago-Kent Law Review* (Vol. 22—No. 2) analyze the recent decision of the Illinois Supreme Court in *Donn* v. *Auto Dealers Investment Company* (385 Ill. 211; 52 N. E. (2nd) 695), as to the priority between the holders of successive trust receipts under the Uniform Trust Receipts Act. (Address: Chicago-Kent Law Review, 10 North Franklin Street, Chicago, Illinois; price for a single copy: $1.00).

Witnesses—"The Duty of Disclosure in Parliamentary Investigations": The results of wide scholarly research into the history and experience of many countries which have or had a parliamentary system are presented in the December (1943) and February (1944) issues of *The University of Chicago Law Review* (Vol. II—Nos. 1 and 2), by Henry W. Ehrman, formerly of the University of Freiburg. The data will be interesting to any who need the background for gauging the duty of disclosure in legislative inquiries. (Address: University of Chicago Law Review, Chicago 37, Illinois; price for a single copy: 75 cents).

Workmen's Compensation Laws—Insurance Features of Such Laws in the Various States: In the March issue of the *Cornell Law Quarterly* (Vol. XXIX—No. 3; pages 353-379) appears the second and concluding installment of an article on "Insurance Features of Workmen's Compensation Laws" in the forty-eight states, by Professor Arthur Lenhoff, formerly a justice of the Supreme Constitutional Court of Austria and professor of law at the University of Vienna, now assistant professor of law and librarian at the University of Buffalo Law

School. The first installment of the article was in the November issue (Vol. XXIX—No. 2; page 176 *et seq.*) The current contribution deals with such phases as the effect of the insurer's absolute liability to the claimant upon the insurer-employer relationship, attempted cancellations of a policy, extensions of coverage by agreement of the parties, the equity jurisdiction of the administrative board as to reformation of a policy, and misrepresentations by employees. (Address: Cornell Law Quarterly, Ithaca, New York; price: $1.00 each for a copy of each of the two issues).

Workmen's Compensation Laws—"The Twilight Zone—A New Theory of Compensation for Maritime Workers"—*Davis* v. *Department of Labor (317 U. S. 249, 763):* In the January issue of the *Washington Law Review and State Bar Journal,* (Vol. XIX, No. 1; pages 32-37), the majority decision in the *Davis* case, distinguishing and limiting in the field of workmen's compensation laws the rule laid down in *Southern Pacific Co.* v. *Jensen* (244 U. S. 205) is trenchantly analyzed by Frank C. Latcham. The practical but important problems still unanswered for employers, in determining the fund to which they will make contributions for the coverage of employees in the "twilight zone," are well pointed out. (Address: Washington Law Review, Seattle, Wash.; price for a single copy: 50 cents.)

New Special Committee on Post-War Organization of the Nations

UNDER the action voted by the House of Delegates on February 29, President Joseph W. Henderson has appointed the following Committee to study and report to the House its recommendations as to what proposals the Association should support as American plans for the post-war organization of the nations for peace and the rule of law:

William L. Ransom, New York City, former President of the American Bar Association, Chairman;
Frederic M. Miller, Justice of the Supreme Court of Iowa, Des Moines, Iowa, Vice Chairman.
Charles M. Hay, General Counsel, War Manpower Commission, St. Louis, Missouri.
Frank E. Holman, Seattle, Washington.
Orie L. Phillips, Senior Circuit Judge of the United States Circuit Court of Appeals for the Tenth Circuit, Denver, Colorado.
M. C. Sloss, former Justice of the Supreme Court of California, San Francisco, California.
Reginald Heber Smith, Boston, Massachusetts.

Judge Miller is the State Delegate from Iowa and Mr. Hay is the State Delegate from Missouri, in the House of Delegates.

The creation and appointment of this Committee result from the action taken, after extended debate, by the House of Delegates on February 29, 1944. This discussion is reported in the April issue of the American Bar Association Journal at pages 233-237.

The action of the House of Delegates adopted the recommendation of the Board of Governors as to a series of resolutions submitted by the Section of International and Comparative Law (page 233). Resolution No. 1 of the Section was adopted by the House. It reaffirmed the Association's adherence to the principles set forth in the resolutions adopted by the House of Delegates on August 27, 1942 (American Bar Association Journal, October 1942 issue), and on March 30, 1943 (American Bar Association Journal, April 1943 issue), and also the principles of the Fulbright and Connally resolutions adopted by the Congress.

Resolutions Nos. II to VI, both inclusive, were referred by the House of Delegates to the new Special Committee for study and report, with a direction for consultation with the Section of International and Comparative Law.

The subjects dealt with in Resolutions Nos. II to VI, both inclusive, and matters within their scope or related to them, therefore constitute at least primarily the matters on which the new Committee is to make its report and recommendations.

The Section of International and Comparative Law has of course made many valuable studies and reports, which will be available to the new Committee.

In announcing the appointment of the Committee, President Henderson said: "I regard this as one of the most timely and important Committees which the Association has ever created. The considered opinion of American lawyers, through the action which will be taken upon the report and recommendations of this representative Committee, should be a factor in the development of an informed public opinion in America, in behalf of the ascendancy of international justice and fair play according to law and the establishment of impartial adjudication as the accepted means of settling disputes between nations."

SUMMARY OF REPORT APPROVED AS TO WAGNER-MURRAY BILL (S. 1161)

THE following has been prepared in order to give a suitable summary of the findings, report, and conclusions of the sub-committee of the Board of Governors as to such parts of the Wagner-Murray Bill (S. 1161), principally, the provisions of Title IX thereof, as propose, among other things, federal authority and control over the medical profession, medical practice, hospitalization, etc., the supervision of which have traditionally been regarded as functions of the state governments under the Constitution of the United States.

Because the sub-committee found that an independent medical profession under the private enterprise system has made available to the people of the United States vastly better medical service, hospitalization, etc., than any system of "state medicine" has ever produced, and because the sub-committee found that federal activity in the form of "socialized medicine" would undermine the high standards of medical practice and service in America, the sub-committee recommended disapproval of indicated parts of the bill.

It will be recalled that on August 26, 1943, the House of Delegates directed that the Board of Governors constitute immediately a Special Committee to "study, analyze and investigate" S. 1161, and to report its findings and recommendations (ABA JOURNAL, October, 1943 issue, page 602). The House of Delegates also declared by its vote the following principle to guide the Committee as to the parts of the bill to be studied and reported on:

> RESOLVED, That the House of Delegates is opposed to any legislation, decree, or mandate that subjects the practice of medicine to federal control and regulation beyond that presently imposed under the American system of free enterprise.

The Board of Governors designated as such sub-committee Messrs. W. Eugene Stanley, of Kansas, chairman; William Logan Martin, of Alabama; and Clement F. Robinson, of Maine. The sub-committee made an exhaustive study and analysis of the voluminous provisions of the pending bill, and presented a comprehensive report, first to the Board of Governors, and then to the House of Delegates at its meeting in Chicago on February 28.

The Majority Action after Debate in the House of Delegates

A significant debate ensued in the House. This was reported in our April issue at pages 194, 198-199. The action of the House was summarized and commented on at pages 182, 211-212 of our April issue. The vote of a majority of the House approved the report and directed its distribution to members of the Congress.

In view of the voluminous character of this notable report, it is impracticable to do more than summarize its conclusions and salient features, within the JOURNAL's sharply limited space. For detailed analysis of the provisions of the bill, members of the Association will have to refer to the full text of the report.

Limited Scope and Objectives of the Committee's Conclusions

The point of view from which the sub-committee studied and analyzed the bill, and the grounds of its opposition to such parts of the bill, notably Title IX thereof, as it found to contravene the principle declared by the House of Delegates, were clearly stated by the sub-committee in its conclusions, which should be read and noted, particularly by any persons who are under the impression that the committee denounced the whole bill and the whole idea of improved medical and hospital service for the people of America rather than primarily the provisions of one out of seven titles in a particular bill, or that the House of Delegates concerned itself with matters which are not within the objectives of the American Bar Association. The sub-committee made its sole angle of approach very clear:

> The American Bar Association is limited to an expression of opinion and judgment with respect to those fields which relate to the administration of justice and which directly affect the safeguards and protection of the rights and liberties of the citizens of this country. Under normal circumstances, therefore, it is not the function of this Association to attempt to influence substantive legislation by the Congress of the United States. But when under the pretext of the general welfare legislation is proposed in Congress which either inadvertently or with deliberate subtlety constitutes a direct attack on the rights and liberties of the citizens of this country, it becomes the duty of this Association actively to voice its objections, a summary of which is as follows:
>
> (1) Local self-government must be preserved in our federal system. State governments directly responsible to the will of the people are best adapted to exercise such supervisory control as may be instituted over the health and medical care of our citizens.
>
> (2) S. 1161 seeks to invest in the Surgeon General who is not an elected servant of the people and who is not amenable to their will the power arbitrarily to make rules and regulations having the force and effect of law which directly affect every home.

The Essentials of Fair Administrative Procedures

> (3) The measure furnishes the instrumentality by which physicians for their practice, hospitals for their continued existence and citizens for their health and that of their families can be made to serve the purposes of a federal agency.
>
> (4) The bill fails to safeguard the rights of patients, citizens, hospitals or doctors with respect to disputes arising

or rights denied through the arbitrary or capricious action of one man.

(5) The bill fails to provide for any appeal to any court from the action of the Surgeon General.

(6) The vicious system whereby administrative officials judge without court review the actions of their subordinates in carrying out orders issued to them is extended in this bill to a point foreign to our system of government and incompatible with the adequate protection of the liberties of the people.

The sub-committee concluded its unanimous report with the following trenchant observation, based on principles and experience which the American Bar Association has espoused vigorously throughout its history:

> The Constitution of the United States is designed to protect the citizens of this republic in the exercise of the rights of free men. The provisions of that instrument can be rendered impotent, when our citizens, for the sake of an apparent immediate benefit, surrender to their government such direct control over their lives that government, by imposing a constant fear upon them of having those benefits withheld or withdrawn, can compel from them obedience and subservience to its dictates.

Specific Reasons for the Committee's Conclusions as to Title IX ("Socializing The Medical Profession")

The report and findings in their entirety are in support and demonstration of the above-stated conclusions; but the findings bring together some of the factual reasons which, together with the detailed analysis of the bill itself, lead to the condemnation of a part of the bill as contravening the principle declared by the House of Delegates last August. At the same time, the report makes clear the confident belief of the sub-committee that the best of medical care and hospital facilities has been and will be made available to the American people under the private enterprise system, and that federal invasion of that field would decrease the quality and acceptability of that service, as well as contravene sound constitutional principles. In these respects the report says, in part:

(1) Under the medical care now provided in the United States the highest level of health and the lowest death rate ever known under similar conditions are being maintained.

(2) There are being developed in this country and under our system of free enterprise many plans for providing adequate medical care without paying the price of socialized medicine. These include group and hospital insurance and Blue Cross Plans under principles approved by the medical profession. The Blue Cross Plan beginning in 1933 and now covering more than fifteen million people provides for the moderate means class, on which hospital bills fall heavily.

(3) The indigent, who are most in need of free medical care, are not covered by S. 1161.

(4) 42 per cent of the expenditures for hospital services and for doctors' services rendered hospital patients in 1942 were either tax-supported or otherwise without cost to the patient and without recourse to federal regulation and control as proposed.

(5) Of all like plans now in effect in foreign countries, none is comparable with the plan proposed by S. 1161 except the Russian system, which involves the complete socialization and regimentation of medicine. Such a pattern, if followed in this country, will inevitably produce a like result. The physician will become merely an unambitious federal employee or a politically ambitious doctor.

(6) Contrary to assertions of the advocates of the measure, the plan covers practically the entire population of the United States except the indigent.

To Put All the People In "A Medical Straight-Jacket"

(7) To safeguard a minimal percentage of the population which has difficulty in obtaining complete medical service, the bill would put all the people in a medical straight jacket under the supervision of the federal government for an alleged service which the vast majority either do not require or are able to provide for themselves.

(8) The measure will inevitably lessen the interest of the physician in his patient as an individual and dull the incentive to produce the best results. The patient will become the guinea pig supplied by the government as the excuse for the payment of subsidies to a controlled profession for its routine services. This would disturb the social order of which both are members and result in vital loss both to the community and to the doctor.

(9) The measure will subject to bureaucratic control and supervision the intimate and confidential relationship between doctor and patient and make confidential information resulting therefrom available to employees of the government.

(10) Medical education and training which have attained an unequalled standard of excellence in institutions conducted under our system of free enterprise would under S. 1161 be subsidized, regulated and controlled by government.

(11) Within the past twenty years the center of medical progress has moved from Germany, Austria and England, which have adopted some form of state medicine and which previously served as centers of post-graduate medical education, to the United States and we now find physicians and hospital administrators coming for guidance and inspiration to this country where no form of state medicine is in effect.

Detailed Analysis of S. 1161 and its Title IX

As broad foundation for the foregoing, the bulk of the report is devoted principally to a full analysis of the parts of the bill dealt with. The bill itself comprises some 90 printed pages. The sub-committee points out that S. 1161 proposes to amend the Social Security Act approved August 14, 1935, by adding under new titles the following subjects (the page references being to the printed bill.)

I-A—Unified National Social Insurance System (page 2);

I-B—A National System of Public Employment Offices (page 3);

II-A—Social Security Protection to Individuals Engaged in the Military Service (page 26);

VIII-A—Unemployment Compensation Allowances on Termination of Military Service (page 36);

IX—Federal Medical, Hospitalization, and Related Benefits (page 39);

IX-A—Federal Social Insurance Contributions (page 58);

XII—Unified Public Assistance Program (page 82);

The sub-committee's studies are stated to have been

related primarily to Title IX, sometimes referred to as Section II of the bill. The report says:

> While your committee is concerned only with Title IX, having to do with Federal Medical, Hospitalization, and Related Benefits, it has been found necessary to give some study to Title IX-A—Federal Social Insurance Contributions, in order to estimate the amount of tax money and the number of individuals involved in the proposed socialized medical system.
>
> It is impossible for the general public to secure an accurate idea of the Socialized Medicine bill. Being a part of an extensive piece of proposed legislation, on other parts of which it is dependent, and prepared in a form which has become popular in the past ten years, being replete with involvement, cross-references, new terminology, percentages and other confusing matters, the socialized medicine chapter leaves the reader in utter confusion as to its meaning or extent.

Specific instances of the foregoing are given at length in the report, with full analysis of the pertinent provisions of the bill.

Extent of Coverage and the Cost to the Public

As to the fiscal aspects of the bill, the report declares that: "From the face of the bill no one can estimate how much tax money is involved nor how many people are covered; so your committee has sought information on which to base answers to these questions." Data was secured from the Social Security Board and the Treasury Department.

These official figures are stated to indicate that if the "socialized medicine" part of the bill had been in effect during 1942, the following would have resulted, as the costs of social insurance contributions:

		Billion dollars
(a)	By employers and employees	7.168
(b)	By self employed	.917
	Total	8.085
(c)	By state and local governments and employees	.259
	Total	8.345

The report says that of the foregoing taxes there would be required to be credited to the Medical Care and Hospitalization Account—

	Billion dollars
1/4 of (a)	1.792
3/7 of (b) and (c)	.547
Total	2.339

As to "the number of people covered by the scheme," the report gives this summary:

	Million
Total employed in industry	44.9
Total employed by state and local governments	3.3
Total employed under Railroad Retirement Act	1.4
Total self employed	10.8
Total covered	60.4

The report points out that it should be kept in mind "that the 3,000,000 federal employees are not included in the scheme by reason of Section 962 (b) (2) [p. 61], which in defining 'employment' excludes services performed in the employ of the United States. The reason for this is that federal employees (in Washington) have their own medical system which is maintained by a 5 per cent salary reduction."

In summarization as to coverage, the report says that "In 1940 there were 34,855,000 occupied dwelling units, or approximately that many families. In the same year there were 52,789,000 persons in the 'Labor Force.' This means that there were about 1.51 members of the labor force for each household. Thus it is almost certain that practically every family had *at least* one member included in the labor force, either at work or seeking work.

"Accordingly, if every individual worker is covered by this Act (as it appears he may be if his earnings are at a prescribed minimum), coverage must include practically all families in the United States. So with virtually complete family coverage by the Act there would be few or no patients left for physicians who prefer private practice to becoming a part of the 'socialized medicine' scheme."

A substantial part of the report is devoted to the detailed correction of, or reply to, what are described as many "inaccuracies" in Senator Wagner's published statements in support of the bill. The painstaking report declares that—

> Of course Senator Wagner does not have the time to engage in the exhaustive studies necessary to enable him to discuss fully the effect of socialized medicine in this country and throughout the world. He must of necessity depend on his staff to provide these studies for him. He doubtless depends also on others who are active in promoting the measure.

A footnote by the committee states that:

> Inquiry from reliable sources in Washington indicates the probability that the actual designers and authors of S. 1161 are Isidore S. Falk and Wilbur J. Cohen, director and assistant director, respectively, of the Bureau of Research and Statistics of the Social Security Board, and Philip Levy, secretary to Senator Wagner. Those who have assisted the Senator are not entirely accurate in some of their statements and their conclusions and in some instances are entirely incorrect.

The report in entirety will be found to be well worth examination by lawyers and other citizens who wish to be in position to contribute to an informed public opinion on this vital subject.

ELMER EPHRAIM ELLSWORTH
THE ODYSSEY OF A YOUNG KNIGHT

BY GEORGE R. FARNUM
of Boston
Former Assistant Attorney General of the United States

> *He is the greatest little man I ever met.*
>
> *Abraham Lincoln (1860)*
>
> *The world can never compute, can hardly even guess, what was lost in his untimely end.*
>
> *John Hay (1896)*

ELMER Ephraim Ellsworth was born in the village of Malta, New York, on April 11, 1837. Of his ancestry little of note has been recorded, other than his paternal great grandfather, though a mere boy, shouldered a Revolutionary musket and participated in the campaign against Burgoyne. The family eked out a precarious existence on the father's slim and uncertain earnings as a tailor. The penury and isolation in which Ellsworth was brought up offered him little in the way of educational advantages. However, endowed with a quick and resourceful brain, a cheerful and friendly nature, and a rare gift for leadership, he exercised at all times a marked ascendency over the boys of the village.

Constrained by family needs, he gave up school and got himself a job in a local store. The father grew restless and the family moved to another village, Mechanicsville—without improving their circumstances. Here Ellsworth was able to attend the district school and at the same time to help his parents by such odd employments as netting pigeons and peddling oysters. Then he tried his hand as a railroad news butch. Finally, when he was about sixteen, he decided to face the world entirely on his own, and obtained a clerkship in a cloth establishment in Troy. Seeking wider fields he went to New York, where he entered a dry goods house. After trying this for a short time he shifted to a job with a Hell Gate construction gang. Still unsettled, he moved to Chicago. Here he obtained a position in the office of certain patent solicitors, being ultimately admitted to the firm. This business failed in about three years and he was out of a job and literally penniless.

Ellsworth was one of those men who seemed predestined for a military career. The love of soldiering was in his blood, though there was nothing in his ancestry to which it could be traced except the young Revolutionary soldier of three generations back. He aspired to enter West Point but family circumstances forbade it. While at Mechanicsville he organized a military company known as The Black Plumed Riflemen. During his sojourn in New York he was a constant spectator at the drills of the famous 7th Regiment.

In Chicago fate brought him into contact with a former surgeon in the French Algerian Army, who had served with a Zouave regiment in the Crimean War. Ellsworth's ardent and romantic nature was immediately attracted by the fighting prestige, the lightning drills and the bizarre uniforms of the Zouave command. He immediately obtained from France the necessary books of instruction and set to work to make himself a master of the Zouave system. Coincidentally he poured over the standard American books on military training and tactics. Organizing classes in gymnastics, he introduced Zouave exercises and drills into their instruction, at the same time perfecting himself in the art of fencing. These preoccupations attracted attention and led to his appointment to the staff of Brig. Gen. R. R. Swift with the rank of major. This in turn opened to him the door to many opportunities to drill cadet companies and instruct them in the new and spectacular technique. In this connection he made a visit to Rockford, where he became affianced to Carrie M. Spafford, whose great grandfather had served as Surgeon General during the Revolution and whose great uncle was General Joseph Warren who fell at Bunker Hill. Carrie's father strongly urged Ellsworth to take up the law as a profession.

Though his heart was elsewhere and, as he wrote, "God only knows what a struggle it cost me to forsake a profession for which I have prepared myself with so much labor and in the face of so many difficulties," in January, 1859, he began reading law in a Chicago office. By April he was able to report, "I read through the first book of Blackstone—read it very carefully (as I imagined), averaged about fifty pages a day." He added, however, "When I finished it, I attempted to review it and see if I had fixed the ideas in my mind." Evidently the test was disillusioning, for he declared, "I saw that I was wasting my time to no purpose, so I commenced the book again. Now I average a page an hour." This proved better, for he concluded, "I am gaining a thorough knowledge of the elements and first principles of the science of the law and the whole opens out into a grand and beautifully developed system."

These studies, however, were destined to sustain a setback for in the spring of 1859 he was chosen captain

This is the eighteenth in a series of biographical studies of eminent soldier-lawyers written by Mr. Farnum for the JOURNAL.

of the National Guard Cadets of Chicago, then well on the way to disintegration. Its name was promptly changed to the United States Zouave Cadets and under Ellsworth's inspiring leadership was reorganized and taught the Zouave system. The uniform consisted of a dark blue collarless jacket with orange and red trimmings with brass buttons, a red sash and baggy red trousers, russet leather leggings buttoned over the trousers and reaching midway between knee and ankle, and all this topped with a brilliant red Chasseur's cap with gold braid.

Ellsworth aspired to raise his Zouaves not only to the pinnacle of military accomplishment in drill and maneuvre and to infuse into them a high martial spirit, but he also designed to instill in them the highest ideals of young American manhood. The commitment to which each member was obligated to subscribe reflected an exacting standard of gentlemanly deportment. This was subsequently amplified by the adoption of a supplemental code of ethics known as the "Golden Resolutions." The following acts—which, parenthetically, apparently indicate some of the prevailing vices among young blades of the Chicago of those days—drew expulsion for the offender and his exposure in the public press:

> First.—Entering drinking saloons at any hour of the day or night, except when compelled by imperative business which cannot be transacted by proxy, in which case a statement of the facts should be made to the Company immediately after the occurrence.
>
> Second.—Entering houses of ill-fame under any circumstances or pretext whatever.
>
> Third.—Entering any gambling saloon, or gambling for any sum of money or article, under any circumstances or pretext.
>
> Fourth.—Entering any private room attached to any hotel or saloon, for drinking or gambling purposes, under any circumstances.
>
> Fifth.—Playing billiards in any public billiard hall or saloon. Playing billiards is interdicted not because of any objection to the game as an elegant amusement to those who can afford it, but because for young men it is a step toward the other offences named, and the excitement and the associations of the billiard saloon naturally lead to drinking.

The concluding paragraph of the "Golden Resolutions" is eloquent of the Spartan spirit with which Ellsworth sought to inspire his men:

> In adopting these rules we are aware of the responsibility we assume, and that we run the risk of diminishing, to some extent, the strength of our Company; but we are convinced that anyone of our number who has not the moral courage and self-control to live up to these principles, has not stamina sufficient to do credit to our Corps; and while we will use all reasonable efforts to induce all our men to remain with us, and others to join, in the hope of extending the benefit of these principles, yet, rather than depart in the slightest degree from these rules, we will part with them, although it reduce our Company to a dozen men.

The Zouave Cadets soon came to be regarded, as the press of the time put it, "with a feeling of pride and satisfaction." The wonder of the community and their popularity grew apace.

While Ellsworth was presenting a cheerful front to the world, he was living literally in destitution. The diary he kept during the spring and summer of 1859 speaks volumes for that proud, brave and determined spirit which sustained him at all times. In entry after entry he records that crackers constituted his meals and the floor his bed. Referring to a pressing dinner invitation, which he declined because he was unable to return the hospitality, he writes, "Gentlemen who, like myself, live on crackers and water seldom dine at hotels." On one occasion he anxiously confides to his diary, "I am afraid that my strength will not hold out. I have contracted a cold sleeping on the floor." Though a lounge which he buys for $3.75 improves his sleeping conditions, his overcoat will still have to serve as an extra covering on cold nights. His monotonous menu begins to pall on him for he declares, "I am about getting to loathe the sight of crackers. If I had something else to eat, and enough of it, or if I could have regular meals, I could learn twice as fast and easily," adding, "It is no light task to confine your mind to your reading when your stomach is absolutely craving for food." Particularly when that reading is Blackstone!

In the fall of 1859 Ellsworth broadcast in the press a ringing challenge to military companies throughout the country to meet his Zouaves in competitive drill. Only one outfit accepted—a company of the 7th New York—and it defaulted in appearance. Undaunted, Ellsworth conceived the ambitious project of taking his men on an extended grand exhibition or challenging tour of the country. After some delay, largely due to lack of necessary funds, on July 2, 1860, he and his Zouaves departed from Chicago on what has been described as "an exhibition unique in our military history." Their itinerary included Detroit, Cleveland, Albany, New York, Boston, West Point, Philadelphia, Baltimore, Washington, Pittsburgh, Cincinnati, St. Louis and Springfield. The difficulties to be surmounted in the planning, preparation and execution of such an enterprise were formidable, but Ellsworth had the imagination, energy, intelligence, and courage to overcome them all. The tour was a phenomenal success and on the night of August 14 the weary but triumphant company arrived back at Chicago, where the whole town turned out to do them honor.

And now, recalling the admonition of Carrie's father and his neglected studies, Ellsworth reluctantly withdrew from his Zouaves and turned his thoughts again to the law. Sometime before, he had made the acquaintance of Abraham Lincoln. General John Cook had written him that "Lincoln has taken in you a greater interest than I ever knew him to manifest in anyone before," and that he had "expressed an earnest desire" for Ellsworth to make Springfield his home and his office his headquarters. So off he went to Springfield and to Lincoln.

As the presidential campaign was then in full swing, it was inevitable that, for the time being, politics

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Fair Procedures for State Administrative Agencies

THE question has naturally been asked as to whether or not the Association's proposed Administrative Procedure Act, approved unanimously by the House of Delegates on February 28 and published in the April JOURNAL at page 226 *et seq.*, is to be regarded as a model statute recommended for adoption by each of the states, so that members of the Association ought to press for its enactment by the respective state legislatures as well as by the Congress.

The answer to such questions is necessarily in the negative. The Association's general measure has been carefully drafted in the light of the existing federal statutes and the practices of the agencies, as suitable for application by law to all of the agencies provided in its text and to any others to which the Congress sees fit to apply it, as a whole or in any part. As a proposed code of fair standards designed to protect the rights of citizens against arbitrary action by federal agencies, its provisions are offered and available to the Congress, if the legislative determination is that all or some of them should be extended to agencies not specified in the proposed bill as approved by the House of Delegates.

The present bill has not been drafted or considered by the House of Delegates in the view of the existing laws of any state as to its administrative agencies. Widely variant conditions exist in different states, as to the status and procedures of their agencies and as to the concept and scope of the judicial review of quasi-judicial determinations of such tribunals. Each such situation would need to be examined and weighed on its own particular facts. In more than a few states, the existing statute and decisional law provide a broader judicial review, particularly as to trials *de novo*, than would be afforded by the present general bill as to federal agencies. In no respect was this bill drawn or supported as grounds for urging that any state should take a retrogressive step.

Beyond doubt, the Association's proposal contains, in principle or in substance, many standards of fair play which could most suitably be adapted to the administrative procedures of states in which they are not already in force. Any such attempted adaptations to state legislation would have to be predicated on a prior study of the laws, decisions, and procedures, in the particular state.

All this is said without prejudice to the efforts of the National Conference of Commissioners on Uniform State Laws to make headway toward some measurable uniformity in state administrative procedures where fact-finding and determinations as to the rights of persons and property are involved, and also toward some harmonious assimilation of federal and state procedures, except where variant constitutional provisions, statutes, or other conditions stand in the way. In furthering practicable uniformities in procedures, the formulation of fair standards in the present bill will be basic and invaluable; but this bill has been drafted only in the light of the federal statutes, decisions, administrative practices, etc., for application to federal agencies.

Improving the Quality of Judge-Made Law

IN THESE days of controversy as to the extent to which judges make and re-make law, readers of this issue will find much which is thought-provoking in the article contributed by Professor John Barker Waite, who writes concerning "Judge-Made Law and the Education of Lawyers."

Many will challenge, at least at first impression, his fundamental postulate that "I dare say that a process of judicial legislation suits this country's needs better than would any other system. The fault in the system is not that the judges legislate, but that they are not trained nor equipped with facilities to legislate well." To many or most of the students of the American form of government, the concept that judges "legislate" is contrary to fundamentals, and "judicial legislation" is only an unscientific phrase to denote and denounce judicial invasion of the legislative process, rather than acceptance of the idea that the judicial function in exposition and application of existing law, includes the processes of law-making *de novo*.

Nevertheless, in the current article the scholarly author proceeds to support his thesis with well-chosen and dramatic instances, of which it would be easy to supply others still more recent. He does not hold back from prophesy that "with the advent of peace and its flux of new conditions, the need for judicial legislation will pervade still wider fields of what now seems established law."

Professor Waite is gravely concerned that courts and judges commonly lack the facilities and the data for en-

lightened and expert performance of even "interstitial" legislation, in which the judges' concept of policy is exalted over the precedents which have been regarded as giving certainty to the law. The contrast between the facilities of legislative bodies for policy-making, and those of the courts, confronts and confounds him. His appeal is, first, that lawyers shall be educated to supply the courts with the required social and economic data as they have been trained to supply information regarding statutes and precedents; but he urges also that the courts must be equipped with facilities for obtaining the necessary information for themselves, if the lawyers fail to supply it. He is not in accord with the idea that the law schools should try to take over wholly this broadened concept of legal education; he would regard that as a "consummation devoutly to be deprecated."

All of this is, of course, profoundly challenging, as well as worthy of the best in American thinking. Without accepting at all his basic characterization, it may frankly be recognized that the problems posed are, as Professor Waite shows himself to be well aware, a part of larger issues which arise from the tripartite concept of the functions of government by law. To illustrate: The observance and enforcement of constitutional limitations and restraints has sometimes been regarded as a duty and function left only to the judicial branch of government. In truth, the duty of keeping within constitutional demarcations is vested in first instance in the legislative and executive branches, during the law-making process; and such questions come to the courts for judicial law-making only at the suit of persons aggrieved by what the legislative or administrative process has done, along lines believed to be contrary to constitutional safeguards.

The concepts which the Congress holds as to the American structure of government, the prerogatives of the states, and the rights of persons, are almost wholly controlling under the Constitution of the United States, so long as carefully-drawn legislation is kept well within the traditional boundries charted by the Constitution. Difficulties and uncertainties arise when, at the instance of pressure groups or otherwise, legislation is enacted by a state or in the Nation, which oversteps the boundries and is predicated on a hope that the courts will find a way to frustrate the impingement.

Out of recent events and current discussions, including that by Professor Waite, there may be emerging a most wholesome awareness that if the Congress wishes to maintain a structure of government and a substance of human rights which have been traditional in America, expert law-making to that end will leave the courts with little occasion or opportunity to substitute their concept of constitutional limitations for that of the Congress whose members have taken the oath of fidelity to the Constitution no less than have the officers of the other two branches of government.

Post-War Cooperation of the Nations for Peace and Law

THE American Bar Association and the lawyers of America have long been committed to the principle and practice of the impartial adjudication of disputes between nations and to the ascendency of law as a substitute for the whims or ambitions of the heads of nations, all as means of preserving peace by removing the causes of war. Many of the greatest names in the Association's history have been identified with outstanding efforts for international collaboration and adjudication.

During 1942 and 1943, the House of Delegates adopted vigorous declarations in keeping with the Association's traditional support for peace and law as substitutes for force and arbitrary power. On the recommendation of its Section of International and Comparative Law, the House espoused heartily the principles of international collaboration which were embodied in the Fulbright and Connally resolutions, later adopted and promulgated by the Congress. The action of the House of Delegates may well have been a part of the volume of informed public opinion which led to those forthright declarations of American objectives.

On February 29 of this year, the House of Delegates unanimously re-affirmed its adherence to those principles. At the same time, a large majority in the representative body was of the opinion that it would have been premature to have committed the Association then to specific details of what it should recommend and urge as specific details of the desirable post-war organization of the nations for peace and law. The international picture was deemed then to be too uncertain and the war too far from won, for the lawyers of America to urge that their Government should try to secure the support of its Allies for very specific details of post-war structure. The House deemed it better that the whole subject and the many proposals should be studied and reported on by a representative Committee, with a view to definitive action at the Annual Meeting on September 11. The views of the lawyers of the whole country were sought.

Accordingly, the matter was referred to a new Special Committee, of which the appointment is announced elsewhere in this issue. It is doubtful if there is anything more important which lawyers past military age could be doing in these times, than trying to help inform and lead American public opinion in support of a practicable plan for the post-war cooperation of the nations to maintain peace and the rule of law.

The American Bar Association has often made valuable contributions to that cause. It should be able to do so now. The new Committee will need, and should have, the assistance and guidance of a full expression of the

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REVIEW OF RECENT SUPREME COURT DECISIONS

By EDGAR BRONSON TOLMAN*

Administrative Law—Judicial Review of Administrative Procedure—Federal Statutes: Emergency Price Control Act of January 30, 1942, and Inflation Control Act of October 2, 1942

The Emergency Price Control Act of January 30, 1942, as amended by the Act of October 2, 1942, does not unconstitutionally delegate legislative power to the Price Administrator. The method of judicial review of the administrative findings and orders of the Board and Administrator does not offend against the rights guaranteed by the "due process" clause of the Constitution.

Yakus v. *U. S.*, 88 L. ed. Adv. Ops. 653; 64 Sup. Ct. Rep. 660; U. S. Law Week 4262. (Nos. 374 and 375, argued January 7, decided March 27, 1944).

This opinion deals with two cases in each of which there were convictions in the District Court for Massachusetts on charges of violating certain sections of the Emergency Price Control Act, as amended by the Inflation Control Act, by the sale of beef above the maximum prescribed by regulations promulgated by the Price Administrator under the authority vested in him by those Acts. On the trial, the validity of the Acts and regulations was duly challenged on constitutional and other grounds, hereafter more fully set forth. The trial court denied the motions, offers of proof and objections, and submitted the case to the respective juries, verdicts of guilty were returned on each case and the court duly entered judgments of conviction on the verdicts. The Circuit Court of Appeals, First Circuit, affirmed. The Supreme Court granted certiorari and the judgments were affirmed.

The opinion of the Court was delivered by the CHIEF JUSTICE. The opinion calls attention to the fact that the accused had not availed themselves of the procedure set up by the Act that "any person subject to a maximum price regulation may test the validity by protest to and hearing before the Administrator, whose decision might be reviewed on complaint by the Emergency Court of Appeals and by the Supreme Court, and that the sixty days allowed by the Act for the filing of protests had expired when the indictments were found.

In the opening paragraph of his opinion the CHIEF JUSTICE states that the questions presented for the decision of the Court are as follows:

> (1) Whether the Emergency Price Control Act of January 30, 1942, . . . as amended by the Inflation Control Act of October 2, 1942, . . . involves an unconstitutional delegation to the Price Administrator of the legislative power of Congress to control prices; (2) whether § 204 (d) of the Act was intended to preclude consideration by a district court of the validity of a maximum price regulation promulgated by the Administrator, as a defense to a criminal prosecution for its violation; (3) whether the exclusive statutory procedure set up by §§ 203 and 204 of the Act for administrative and judicial review of regulations, with the accompanying stay provisions, provide a sufficiently adequate means of determining the validity of a price regulation to meet the demands of due process; and (4) whether, in view of this available method of review, § 204 (d) of the Act, if construed to preclude consideration of the validity of the regulation as a defense to a prosecution for violating it, contravenes the Sixth Amendment, or works an unconstitutional legislative interference with the judicial power.

As to the first of these questions, the CHIEF JUSTICE says:

> The Emergency Price Control Act provides for the establishment of the office of Price Administration under the direction of a Price Administrator appointed by the President, and sets up a comprehensive scheme for the promulgation by the Administrator of regulations or orders fixing such maximum prices of commodities and rents as will effectuate the purposes of the Act and conform to the standards which it prescribes. The Act was adopted as a temporary wartime measure, and provides in § 1 (b) for its termination on June 30, 1943, unless sooner terminated by Presidential proclamation or concurrent resolution of Congress. By the amendatory Act of October 2, 1942, it was extended to June 30, 1944.

The opinion then points to the provisions of the Act which declare that the stabilization of price and prevention of inflation is "in the interest of the national defense and security and necessary to the effective prosecution of the present war."

The CHIEF JUSTICE next points out the provisions of the Act which are to guide the Administrator's authority to fix prices, particularly those which authorize the Administrator, after consultation with representative members of the industry, so far as practicable, to promulgate regulations fixing prices of commodities which "in his judgment will be generally fair and equitable and will effectuate the purposes of this Act" when in his judgment prices have risen or threaten to rise to an extent and in a manner inconsistent with the purposes of the Act.

Discussing the basic constitutional questions, the CHIEF JUSTICE says:

> That Congress has constitutional authority to prescribe commodity prices as a war emergency measure, and that the Act was adopted by Congress in the exercise of that power, are not questioned here, and need not now be considered save as they have a bearing on the procedural features of the Act later to be considered which are challenged on constitutional grounds.

The opinion declares that Congress enacted the Emergency Price Control Act in pursuance of a defined policy and required that the prices fixed by the Admin-

*ASSISTED by JAMES L. HOMIRE and MARK H. JOHNSON (tax cases).

istrator should further that policy and conform to the standards prescribed by the Act. Following this examination of the purposes of the Act, the CHIEF JUSTICE says:

> The Act is thus an exercise by Congress of its legislative power. In it Congress has stated the legislative objective, has prescribed the method of achieving that objective—maximum price fixing—and has laid down standards to guide the administrative determination of both the occasions for the exercise of the price-fixing power, and the particular prices to be established.

The Emergency Price Control Act is distinguished from the National Industrial Recovery Act of June 16, 1933, and the CHIEF JUSTICE says:

> The Constitution as a continuously operative charter of government does not demand the impossible or the impracticable. It does not require that Congress find for itself every fact upon which it desires to base legislative action or that it make for itself detailed determinations which it has declared to be prerequisite to the application of the legislative policy to particular facts and circumstances impossible for Congress itself properly to investigate. The essentials of the legislative function are the determination of the legislative policy and its formulation and promulgation as a defined and binding rule of conduct—here the rule, with penal sanctions, that prices shall not be greater than those fixed by maximum price regulations which conform to standards and will tend to further the policy which Congress has established. These essentials are preserved when Congress has specified the basic conditions of fact upon whose existence or occurrence, ascertained from relevant data by a designated administrative agency, it directs that its statutory command shall be effective. It is no objection that the determination of facts and the inferences to be drawn from them in the light of the statutory standards and declaration of policy call for the exercise of judgment, and for the formulation of subsidiary administrative policy within the prescribed statutory framework.

In regard to the doctrine of the separation of powers, the opinion declares:

> As we have said, "The Constitution has never been regarded as denying to the Congress the necessary resources of flexibility and practicality . . . to perform its function." . . . Hence it is irrelevant that Congress might itself have prescribed the maximum prices or have provided a more rigid standard by which they are to be fixed; for example, that all prices should be frozen at the levels obtaining during a certain period or on a certain date. . . .
>
> It is free to avoid the rigidity of such a system, which might well result in serious hardship, and to choose instead the flexibility attainable by the use of less restrictive standards. . . . Only if we could say there is an absence of standards for the guidance of the Administrator's action, so that it would be impossible in a proper proceeding to ascertain whether the will of Congress has been obeyed, would be justified in overriding its choice of means for effecting its declared purpose of preventing inflation.

It is pointed out that the standards prescribed by the present Act with the aid of the "statement of considerations", required to be made by the Administrator, are sufficiently definite and precise to enable Congress, the courts and the public to ascertain whether the Administrator, in fixing the designated prices, has conformed to those standards. Emphasis is laid on the fact that the authority to fix prices becomes operative "only when prices have risen or threaten to rise to an extent or in a manner inconsistent with the purpose of the Act to prevent inflation, and it is declared that this purpose is no broader than the authority to fix maximum prices when deemed necessary to protect consumers against unreasonably high prices heretofore sustained by the Court in *Sunshine Anthracite Coal Co.* v. *Adkins*, and other cases cited and summarized.

As to the second of the above enumerated questions, whether Congress may lawfully limit a person accused of a breach of the Act to the special procedure prescribed in the Act, it is pointed out that the procedure consists of the filing of a protest within ninety days after the issuance of the regulation protested, the review of the Administrator's decision on such protests by the special Emergency Court of Appeals with the right of review of the decision of that court by the Supreme Court. Provisions of the statute are quoted, relevant decisions are cited and analyzed and the conclusion of the Court on this point is stated as follows:

> Congress, in thus authorizing consideration by the district court of the validity of the Act alone, gave clear indication that the validity of the Administrator's regulations or orders should not be subject to attack in criminal prosecutions for their violation, at least before their invalidity had been adjudicated by recourse to the protest procedure prescribed by the statute. Such we conclude is the correct construction of the Act.

The third question is then taken up, namely, the challenge of the accused that the provisions of the Act deprived the accused of the opportunity to attack the Regulation in a prosecution for its violation and thus deprived them of the due process of law guaranteed by the Fifth Amendment. On this point, the CHIEF JUSTICE says:

> Inflation is accelerated and its consequences aggravated by price disparities not based on geographic or other relevant differentials. The harm resulting from delayed or unequal price control is beyond repair. And one of the problems involved in the prevention of inflation by establishment of a nation-wide system of price control is the disorganization which would result if enforcement of price orders were delayed or sporadic or were unequal or conflicting in different parts of the country. These evils might well arise if regulations with respect to which there was full opportunity for administrative revision were to be made ineffective by injunction or stay of their enforcement in advance of such revision or of final determination of their validity.
>
> Congress, in enacting the Emergency Price Control Act, was familiar with the consistent history of delay in utility rate cases. It had in mind the dangers to price control as a preventive of inflation if the validity and effectiveness of prescribed maximum prices were to be subject to the exigencies and delays of litigation originating in eighty-five district courts and continued by separate appeals through eleven separate courts of appeals to this Court, to say nothing of litigation conducted in state courts.
>
> Congress sought to avoid or minimize these difficulties by the establishment of a single procedure for review of the Administrator's regulations, beginning with an appeal to

the Administrator's specialized knowledge and experience gained in the administration of the Act, and affording to him an opportunity to modify the regulations and orders complained of before resort to judicial determination of their validity. The organization of such an exclusive procedure especially adapted to the exigencies and requirements of a nation-wide scheme of price regulation is, as we have seen, within the constitutional power of Congress to create inferior federal courts and prescribe their jurisdiction.

* * *

For the purpose of this case, in passing upon the sufficiency of the procedure upon protest to the Administrator and complaint to the Emergency Court, it is irrelevant to suggest that the Administrator or the court has in the past or may in the future deny due process. Action taken by them is reviewable in this Court and if contrary to due process will be corrected here. Hence we have no occasion to pass upon determinations of the Administrator or the Emergency Court, said to violate due process, which have never been brought here for review, and obviously we cannot pass upon action which might have been taken on a protest by petitioners, who have never made a protest or in any way sought the remedy Congress has provided. In the absence of any proceeding before the Administrator we cannot assume that he would fail in the performance of any duty imposed on him by the Constitution and laws of the United States, or that he would deny due process to petitioners by "loading the record against them" or denying such hearing as the Constitution prescribes.

* * *

In the circumstances of this case we find no denial of due process in the statutory prohibition of a temporary stay or injunction. The present statute is not open to the objection that petitioners are compelled to serve the public as in the case of a public utility, or that the only method by which they can test the validity of the regulations promulgated under it is by violating the statute and thus subjecting themselves to the possible imposition of severe and cumulative penalties. For as we have seen, § 4(d) specifically provides that no one shall be compelled to sell any commodity, and the statute itself provides an expeditious means of testing the validity of any price regulation, without necessarily incurring any of the penalties of the Act.

* * *

Here, in the exercise of the power to protect the national economy from the disruptive influences of inflation in time of war, Congress has seen fit to postpone injunctions restraining the operations of price regulations until their lawfulness could be ascertained by an appropriate and expeditious procedure. In so doing it has done only what a court of equity could have done, in the exercise of its discretion to protect the public interest. What the courts could do Congress can do as the guardian of the public interest of the nation in time of war. The legislative formulation of what would otherwise be a rule of judicial discretion is not a denial of due process or a usurpation of judicial functions.

* * *

Our decisions leave no doubt that when justified by compelling public interest the legislature may authorize summary action subject to later judicial review of its validity. It may insist on the immediate collection of taxes. . . . It may take possession of property presumptively abandoned by its owner, prior to determination of its actual abandonment.

Coming to the last of the questions involved, the CHIEF JUSTICE says:

As we have seen, Congress, through its power to define the jurisdiction of inferior federal courts and to create such courts for the exercise of the judicial power, could, subject to other constitutional limitations, create the Emergency Court of Appeals, give to it exclusive equity jurisdiction to determine the validity of price regulations prescribed by the Administrator, and foreclose any further or other consideration of the validity of a regulation as a defense to a prosecution for its violation.

Unlike most penal statutes and regulations whose validity can be determined only by running the risk of violation, see *Douglas* v. *City of Jeanette*, 319 U. S. 157, 163, the present statute provides a mode of testing the validity of a regulation by an independent administrative proceeding. There is no constitutional requirement that that test be made in one tribunal rather than in another, so long as there is an opportunity to be heard and for judicial review which satisfies the demands of due process, as is the case here. And we are pointed to no principle of law or provision of the Constitution which precludes Congress from making criminal the violation of an administrative regulation, by one who has failed to avail himself of an adequate separate procedure for the adjudication of its validity, or which precludes the practice, in many ways desirable, of splitting the trial for violations of an administrative regulation by committing the determination of the issue of its validity to the agency which created it, and the issue of violation to a court which is given jurisdiction to punish violations. Such a requirement presents no novel constitutional issue.

Concluding the opinion, the CHIEF JUSTICE says:

In the exercise of the equity jurisdiction of the Emergency Court of Appeals to test the validity of a price regulation, a jury trial is not mandatory under the Seventh Amendment. . . . Nor has there been any denial in the present criminal proceeding of the right, guaranteed by the Sixth Amendment, to a trial by a jury of the state and district where the crime was committed. Subject to the requirements of due process which are here satisfied, Congress could make criminal the violation of a price regulation. The indictment charged a violation of the regulation in the district of trial, and the question whether petitioners had committed the crime thus charged in the indictment and defined by Congress, namely, whether they had violated the statute by willful disobedience of a price regulation promulgated by the Administrator, was properly submitted to the jury.

Mr. Justice ROBERTS filed a dissenting opinion. He declared his conviction that "the Act unconstitutionally delegates legislative power to the Administrator," that the standards prescribed were not sufficiently precise, and that the method and extent of judicial review prescribed by the Act did not effectively prohibit the transgression of those standards.

Mr. Justice RUTLEDGE also filed a dissenting opinion, in which Mr. Justice MURPHY joined. The dissenting opinion declared "agreement with the Court's conclusions upon the substantive issues", but protested inability to believe that the trial conformed to constitutional requirements.

The case was argued by Mr. Joseph Kruger for Yakus and by Mr. Leonard Poretsky and Mr. William H. Lewis for Rottenberg, and by Mr. Solicitor General Fahy for the United States.

Administrative Law—Rent Regulation—Review of Administrative Action

The provisions of the Emergency Price Control Act of 1942 fixing maximum limits for rent are not unconstitutional.

Bowles, Administrator, O. P. A., v. *Willingham, et al.*, 88 L. ed. Adv. Ops. 626; 64 Sup. Ct. Rep. 641; U. S. Law Week 4238. (No. 464, argued January 7 and 10, decided March 27, 1944).

Action was brought in a Georgia court to restrain the issuance of certain rent orders under the Emergency Price Control Act of 1942 on the ground that the orders and the statutory provisions upon which they were based were unconstitutional. A temporary injunction was issued *ex parte* whereupon the Administrator brought an action in the federal district court pursuant to Section 205a of the Act, to restrain further prosecution of the state proceedings. The district court dismissed the Administrator's action on bill and answer, holding that the orders and the provisions of the Act on which they rested were unconstitutional. The case was taken to the Supreme Court by direct appeal and the judgment of the district court was reversed. The opinion of the Court was delivered by Mr. Justice DOUGLAS. He opens the discussion by the citation of relevant provisions of the statute. He says:

> Sec. 2 (b) of the Act provides in part that, "Whenever in the judgment of the Administrator such action is necessary or proper in order to effectuate the purposes of this Act, he shall issue a declaration setting forth the necessity for, and recommendations with reference to, the stabilization or reduction of rents for any defense-area housing accommodations within a particular defense rental area."

Pursuant to that authority, the Administrator issued a declaration designating twenty-eight areas in various parts of the country including Macon, Georgia, as defense-rental areas. The declaration stated that housing rents had been increased in those areas because of defense activities and that it was necessary and proper, therefore, in order to effectuate the purposes of the Act, to establish and reduce those rents. It also contained a recommendation, pursuant to the Act, that the maximum rent for housing accommodations on April 1, 1941, should be the rent for such accommodations which prevailed on that date. The recommendation also stated in accordance with the provisions of the Act, that if within sixty days after April 28, 1942, rents within those areas had not been stablized or reduced by state or local administration, the Administrator might fix the maximum rent regulation No. 26, effective July 1, 1942, establishing the maximum legal rents for housing in those defense areas including Macon, Georgia. It recited that where rents had not been reduced or stabilized, defense activities had resulted in increases in the rentals on or about April 1, 1941. Maximum rentals were accordingly fixed for housing accommodations rented on April 1, 1941, at the rents which generally obtained on that date. Within sixty days after final action of the rent director, the landlord was given leave to file an application for review by the regional administrator and then to file a protest with the Administrator for review of the action of the rental office.

In June, 1942, the rent director gave written notice that he proposed to decrease the maximum rents for three apartments owned by appellant, which had not been rented on April 1, 1941, but were rented in the summer of that year on the ground that the amounts charged and received were in excess of those generally prevailing on April 1, 1941, in that area for comparable accommodations.

Objections were filed to the proposed action and the director gave notice that he would proceed to order a reduction of the rentals. Before that was done the action was begun in the Georgia court. In analyzing the fundamental question involved Mr. Justice DOUGLAS says:

> I. We are met at the outset with the question whether the District Court could in any event give the relief which the Administrator seeks in view of § 265 of the Judicial Code (36 Stat. 1162, 28 U. S. C. § 379) which provides that "The writ of injunction shall not be granted by any court of the United States to stay proceedings in any court of a state, except in cases where such injunction may be authorized by any law relating to proceedings in bankruptcy." We recently had occasion to consider the history of § 265 and the exceptions which have been engrafted on it. . . . In that case we listed the few Acts of Congress passed since its first enactment in 1793 which operate as implied legislative amendments to it. 314 U. S. pp. 132-134. There should now be added to that list the exception created by the Emergency Price Control Act of 1942. By § 205 (a) the Administrator is given authority to seek injunctive relief in the appropriate court (including the federal district courts) against acts or practices in violation of § 4, e. g., the receipt of rent in violation of any regulation or order under § 2. Moreover, by § 204 (d) of the Act one who seeks to restrain or set aside any order of the Administrator or any provision of the Act is confined to the judicial review granted to the Emergency Court of Appeals, which was created by § 204 (c) and to this Court. As we recently held in *Lockerty* v. *Phillips*, 319 U. S. 182, 186, 187, Congress confined jurisdiction to grant equitable relief to that narrow channel and withheld such jurisdiction from every other federal and state court. Congress thus preempted jurisdiction in favor of the Emergency Court to the exclusion of state courts. The rule expressed in § 265 which is designed to avoid collisions between state and federal authorities (*Toucey* v. *New York Life Ins. Co., supra*) thus does not come into play. The powers of the District Court under § 205 (a) of the Act and § 24 (1) of the Judicial Code are ample authority for that court to protect the exclusive federal jurisdiction which Congress created.

In answer to a contention that Congress could not constitutionally withhold from the courts of the states, jurisdiction to entertain suits attacking the Act on constitutional grounds, Mr. Justice DOUGLAS says:

> But we have here a controversy which arises under the Constitution and laws of the United States and is therefore within the judicial power of the United States as

defined in Art. III, § 2 of the Constitution. Hence Congress could determine whether the federal courts which it established should have exclusive jurisdiction of such cases or whether they should exercise that jurisdiction concurrently with the courts of the states. . . . Under the present Act all jurisdiction has not been withheld from state courts, since they have concurrent jurisdiction over all civil enforcement suits brought by the Administrator. §205 (c). But the authority of Congress to withhold all jurisdiction from the state courts obviously includes the power to restrict the occasions when that jurisdiction may be invoked.

Reverting to the similarity of the constitutional questions involved in the rent control provisions of the Act to those involved in the regulation of commodity prices, Mr. Justice DOUGLAS says:

The considerations which support the delegation of authority under this Act over commodity prices (*Yakus* v. *United States*) are equally applicable here. The power to legislate which the Constitution says "shall be vested" in Congress (Art. I. § 1) has not been granted to the Administrator. Congress in § 1 (a) of the Act has made clear its policy of waging war on inflation. In § 2 (b) it has defined the circumstances when its announced policy is to be declared operative and the method by which it is to be effectuated. Those steps constitute the performance of the legislative function in the constitutional sense.

* * *

Congress has directed that maximum rents be fixed in those areas where defense activities have resulted or threaten to result in increased rentals inconsistent with the purpose of the Act. And it has supplied the standard and the base period to guide the Administrator in determining what the maximum rentals should be in a given area.

* * *

The question of how far Congress should go in filling in the details of the standards which its administrative agency is to apply raises large issues of policy. . . . We recently stated in connection with this problem of delegation, "The Constitution, viewed as a continuously operative charter of government, is not to be interpreted as demanding the impossible or the impracticable." . . . In terms of hard-headed practicabilities Congress frequently could not perform its functions if it were required to make an appraisal of the myriad of facts applicable to varying situations, area by area throughout the land, and then to determine in each case what should be done. Congress does not abdicate its functions when it describes what job must be done, who must do it, and what is the scope of his authority. In our complex economy that indeed is frequently the only way in which the legislative process can go forward.

* * *

The Administrator on the denial of protests must inform the protestant of the "grounds upon which" the decision is based and of any "economic" data and other facts of which the Administrator has taken official notice. § 203 (a). These materials and the grounds for decision which they furnished are included in the transcript on which judicial review is based. § 204 (a). We fail to see how more could be required (*Taylor* v. *Brown*, 137 F. 2d 654, 658-659) unless we were to say that Congress rather than the Administrator should determine the exact rentals which Mrs. Willingham might exact.

In regard to the adequacy of provisions for the review of the rent regulation orders, reference was made to the opinion in the *Yakus* case, reviewed in this issue, as to the control of commodity prices, it is declared that the principle announced in the case of *Yakus* v. *United States, supra,* controlled. Reference is also made to the statute passed during the First World War for the regulation of rates in the District of Columbia and to the decisions of the Court sustaining that statute and to other cases.

In regard to due process, Mr. Justice DOUGLAS says:

Language in the cases that due process requires a hearing before the administrative order becomes effective . . . is to be explained on two grounds. In the first place the statutes there involved required that procedure.

Secondly, as we have held in *Yakus* v. *United States, supra,* Congress was dealing here with the exigencies of war time conditions and the insistent demands of inflation control. . . . Congress chose not to fix rents in specified areas or on a national scale by legislative fiat. It chose a method designed to meet the needs for rent control as they might arise and to accord some leeway for adjustment within the formula which it prescribed. At the same time the procedure which Congress adopted was selected with the view of eliminating the necessity for "lengthy and costly trials with concomitant dissipation of the time and energies of all concerned in litigation rather than in the common war effort."

The opinion closes as follows:

We fully recognize . . . that "even the war power does not remove constitutional limitations safeguarding essential liberties." . . . But where Congress has provided for judicial review after the regulations or orders have been made effective it has done all that due process under the war emergency requires.

Other objections are raised concerning the regulations or orders fixing the rents. But these may be considered only by the Emergency Court of Appeals on the review provided by § 204.

Mr. Justice RUTLEDGE filed a separate concurring opinion expressing views similar to those expressed by him in the *Yakus* and *Rottenberg* cases.

Mr. Justice ROBERTS filed a dissenting opinion. He states the reasons for so doing as follows:

I should be content if reversal of the District Court's decision were upon the ground that that court lacked power to enjoin prosecution of the appellees' state court suit. The policy expressed in § 265 of the Judicial Code applies in this instance. Moreover, if the provision of § 204 (d) of the Emergency Price Control Act is valid, the lack of jurisdiction of the state court could, and should, have been raised in that court and review of its ruling could have been obtained by established means of resort to this Court. Since, however, the court has determined that the District Court acted within its competency in enjoining further prosecution of the state court suit, other issues must be faced.

He challenges what he calls "the appellees' principal contention," the unconstitutional delegation of legislative power to an administrative officer. He regards the Act as clearly abdicating legislative action and delegating to the Administrator the power to regulate rents. He follows the provisions of the Act

in detail and declares that each of the things which the Emergency Price Control Act authorizes the agency or the Administrator to do, necessarily involves the making of law. His position, perhaps, is best illustrated by the following quotation:

> I am far from urging that, in the present war emergency, rents and prices shall not be controlled and stabilized. But I do insist that, war or no war, there exists no necessity, and no constitutional power, for Congress' abdication of its legislative power and remission to an executive official of the function of making and repealing laws applicable to the citizens of the United States.

He parallels this case with the *Schechter* case and supports his dissent by what was said by the Court in that case. As to the adequacy of the judicial review provided by the Act, he declares that the grant of judicial review is illusory, and refers to his opinion in the *Yakus* case for an elaboration of his position.

The case was argued by Mr. Paul A. Freund for OPA and by Mr. Charles J. Block for Willingham.

Emergency Price Control Act of 1942—Regulation of Public Utility Rates—Intervention in Proceedings Before State Commissions

Under this Act the power to regulate the rates of common carriers and other public utilities is not conferred upon the Price Administrator, but is left to be exercised in accordance with previously existing law.

Upon intervention by the Price Administrator and the Director of Stabilization in proceedings before appropriate regulatory bodies the latters' rules of practice are held to govern the intervention, and the Price Administrator and the Director may not compel an enlargement of the issues in the case contrary to the applicable rules of practice.

Fred M. Vinson, Director, etc., et al., v. *Washington Gas Light Company, et al.*, 88 L. ed. Adv. Ops. 646; 64 Sup. Ct. Rep. 731; U. S. Law Week 4256. (No. 396, argued February 11 and 14, decided March 27, 1944).

The Director of Economic Stabilization and the Price Administrator were granted certiorari to review a rate order of the Public Utilities Commission of the District of Columbia. The Director and the Administrator had intervened before the Commission and appealed from its order to the District Court which set aside the order as arbitrary and illegal. The Court of Appeals reversed.

The Commission was created by Act of Congress in 1913. Existing statutes vest the Commission with customary powers over the rates and services of public utilities. After protracted proceedings the Commission approved a sliding scale arrangement involving a rate base to be adjusted annually by adding net property additions at cost, a rate of return, and a rate of accrual to retirement reserve, in the light of which the rates of the company were to be adjusted annually. At the inception of the plan, rates were reduced by some $800,000 annually, and subsequent hearings resulted in rate reductions in each year after 1935, except in 1937 and 1941, when no changes were made. In March, 1942, a further investigation was ordered resulting in the issuance on July 21, 1942, of a notice of hearing as to rates which were to become effective September 1, 1942, under the sliding scale arrangement. The Price Administrator was allowed to intervene and was represented at a prehearing conference and at all hearings up to their close on September 14, 1942. Later, the proceedings were reopened and were again closed after the Administrator had participated and filed a second brief.

The Emergency Price Control Act, § 302 (c) provides that nothing in it shall be construed to authorize the regulation of rates charged by any public utility. The Stabilization Act, however, prohibits any utility from making any general increase of rates or charges in effect September 15, 1942, without giving the President's agent the right to intervene in the proceeding.

The Commission's rules, however, provide that the granting of an intervention shall not be effective to change or enlarge the issues in the proceedings except where such change or enlargement is expressly requested by the intervenor and is expressly granted by the Commission after all parties have had opportunity to be heard on the question. After the intervention was allowed, the Commission afforded the intervenors an opportunity to present additional evidence as to the inflationary effect, if any, of the increased rates authorized by the Commission's order. The Administrator, however, offered no witnesses but renewed a motion previously made that the proceedings be reopened without restrictions as to the type of evidence to be presented and that the order be vacated. The proceedings were closed for the third time without the offering of any testimony as to the national economic policy developed under the Price Control Act and the effect thereon of the increase of rates of public utilities.

On certiorari the Supreme Court, in an opinion by Mr. Justice ROBERTS, affirmed the ruling of the Court of Appeals, which had sustained the Commission.

In discussing the issues, the Court first points out that the statute, though allowing intervention by the President's agent, does not purport to confer greater rights on an intervention of that character than an intervention by others would have. In this connection Mr. Justice ROBERTS says:

> Evidently Congress intended to grant the Administrator plenary control over commodity prices, since they generally were not the subject of local regulation, but in both the original Act and the amendment, as this Court has recently said in *Davies Warehouse Co.* v. *Bowles*, No. 112, October Term, 1943, was careful "to avoid paralyzing or extinguishing local institutions." Thus it limited the right of the Executive to notice by the utility and the utility's consent that the Executive might be heard by the regulatory body having final authority in the premises.
>
> If the petitioners were admitted as intervenors by a state commission, or by the District Commission, which is a respondent here, they might, of course, be admitted to participation in the proceeding upon reasonable terms; and one of the most usual procedural rules is that an intervenor is admitted to the proceeding as it stands, and in respect of the pending issues, but is not permitted to enlarge those issues or compel an alteration of the nature of

the proceeding. To this effect was the Commission's rule on the subject. It would seem then that, in the absence of clear legislative mandate to the contrary, the petitioners should not possess greater rights than other intervenors.

This the petitioners deny. They say that, notwithstanding the absence of any categorical enactment, the general purpose of the original Act and its supplement show that Congress intended to prohibit state and local regulatory authorities from permitting any increase in utility rates which were not shown to be necessary to prevent actual hardship. We are asked then, not only to revise the views expressed in *Davies Warehouse Co.* v. *Bowles, supra*, as to the scope of the Acts, but to infer from a general expression of congressional policy, the limitation of existing powers conferred by law on regulatory commissions throughout the nation, both state and federal, and the endowment of a different federal agency with new and superior rights and powers. This we are unable to do.

Also considered was the contention that the Price and Stabilization officials were denied a fair hearing because the Commission refused to enlarge the scope and character of the inquiry. In rejecting this contention the Court summarizes the facts bearing on the question and says:

> The other contention of the petitioners stems from their view as to the effect of the Emergency Price Control Act and the Stabilization Act. They insisted below that they were denied a fair hearing because the Commission refused, in the current proceeding, to alter and enlarge the scope and the character of the inquiry. It will be remembered that, under the Commission's existing order, a termination of the sliding scale arrangement required ninety days' written notice. There was no application of any rate payer or any purpose of the Commission in the spring of 1942 to abrogate the arrangement. On the contrary, the Commission gave the required notice for the usual annual adjustment under the plan; and, after the necessary investigations by its agents, gave notice of hearing with respect to such adjustment. At that point, and at a time when no notice of increase of rates was required by any Act of Congress, the Administrator, upon his application was permitted to intervene in the proceeding.
>
> In his petition, and at the hearings, he asserted and reiterated that he had the right to go into the propriety of the rate base, the operating expenses, including depreciation expenses, taxes, and rate of return, summarizing his demand as "a full and complete inquiry for the purpose of determining what are fair and reasonable rates." . . . The petitioners now insist that their desire was limited to examination of certain factors involved in the sliding scale. But the courts below did not so understand. The District Court, which sustained the appeal, said: "The Commission was requested to reconsider the basic principle of the sliding scale arrangement" . . . The Court of Appeals said "the Price Administrator departed from the field committed to his care and demanded that the Commission suspend the application of the sliding scale, and reexamine its basis in a complete investigation of all the elements that enter into the determination of a utility rate by a regulatory body." These characterizations of the Administrator's contentions before the Commission are supported by the record.
>
> If we consider the petitioner's present position we find that the Commission heard all evidence offered, and says it weighed it. The Administrator urged that the straight line method of depreciation embodied in the sinking fund plan must be discarded in favor of a sinking fund method under the force of decisions of this Court, a position unsupported by our cases, and evidence was offered to show the result which would ensue the substitution. Some testimony was adduced as to rate of return, and the Commission's report shows this was considered. In short, if the inquiry was limited to the issues comprehended in the Commission's order of investigation, the petitioners were afforded every opportunity for a full hearing. On the subject respecting which the petitioners were especially competent to enlighten the Commission,—namely the inflationary effect of a rate increase of 2.28% for one year, amounting, on the average, to three cents per month per customer, in the light of wage increases and increased commodity prices and over-all conditions in the national economy,—no evidence was tendered by petitioners, in response to repeated invitations by the Commission.

Mr. Justice DOUGLAS delivered a dissenting opinion in which Mr. Justice BLACK and Mr. Justice MURPHY concurred.

The substance of the dissenting opinion appears in the following portions thereof:

> This case goes hand in hand with *Davies Warehouse Co.* v. *Bowles*, 321 U. S. —. That decision expanded the "public utility" exemption in the Emergency Price Control Act to include a wide variety of enterprises. The present decision illustrates the value of that preferred treatment.
>
> The Stabilization Act prohibits any "utility" from making "any general increase in its rates or charges which were in effect on September 15, 1942" without giving the President's agent the right to intervene in the proceedings. The present decision goes far towards making that provision ineffective. It allows the commission so to shape the issues of the rate proceeding as to exclude the data most relevant to a determination of whether any rate increase should be allowed. The power of a commission to shape the issues as it desires and to restrict the Director of Economic Stabilization to those issues is not a power which is apt to be neglected. The Director may of course proclaim against rate increases. But he does not need the right to intervene to prove that rate increases are inflationary. That is self-evident. The right to intervene, if it is not a right to introduce relevant data bearing on the true earnings and returns of the utility, is an empty right indeed.
>
> I agree that Congress did not transfer rate-making powers from the commissions to the Director. I agree that Congress must have contemplated that some rate increases might take place or else it would have treated the whole problem quite differently. But I find not the slightest indication that the Director was to be denied a full hearing. And I do not see how a full hearing could be accorded unless he was given the opportunity to establish, if he could, that the case under consideration showed no real hardship, that wartime demands were not causing the company to suffer, that its financial integrity and its ability to render service remained unimpaired, that its property was not being confiscated, that it was not being treated unfairly as compared with other companies.
>
> We are told that this company has an inflated rate base of some $1,000,000. We are told that its excessive charges for depreciation expense were over $225,000 a year as compared with the rate increase of about $200,000 a year. We are told that a full hearing would have disclosed that the company was in fact earning more than 6½%. I do not know what the evidence would show. But an offer of proof in a rate case could not be more relevant.
>
> I believe, moreover, that when Congress halted general rate increases and gave the Director a right to intervene, it did not sanction rate increases regardless of need and regardless of inflationary effect. I think it meant to make utility commissions at least partial participants in the war

against inflation and gave them a sector of the front to control. Though it did not remove the established standards for rate-making I do not think it intended utility commissions to proceed in disregard of the requirements of emergency price control and unmindful of the dangers of general rate increases. To the contrary, I think Congress intended that there should be as great an accommodation as possible between the old standards and the new wartime necessities.

The case was argued by Mr. Paul A. Freund for Vinson and by Mr. Richmond B. Keech for the Public Utilities Commission, and by Mr. Stoddard M. Stevens, Jr., for the Gas Company.

Sherman Act—Price Control Arrangements Between an Exclusive Distributor and Wholesalers and Retailers—Miller-Tydings Act

Under the Sherman Act, though the distributor of unpatented articles may select the persons to whom he sells and exclude those he pleases, and may fix prices satisfactory to himself, he may not project his power over prices upon resale. The distributor of a trade-marked article may not lawfully limit by agreement the price at which, or the persons to whom his purchaser may resell, except as permitted by the Miller-Tydings Act.

Fair Trade agreements for the control of prices, otherwise lawful under the Miller-Tydings Act, may be nullified in proceedings under the Sherman Act if they are part of a scheme or conspiracy illegal under that Act, and the abolition of the entire illegal arrangement cannot be adequately accomplished otherwise.

United States v. *Bausch & Lomb Optical Company*, 88 L. ed. Adv. Ops. 736; 64 Sup. Ct. Rep. 805; U. S. Law Week 4300. (Nos. 62 and 64, argued December 8, 1943, decided April 10, 1944).

These are direct appeals from the District Court which had entered a decree against Soft-Lite Lens Company and certain of its officers to restrain violation of the Sherman Act. The allegations are that Bausch & Lomb Optical Company and Soft-Lite Lens Company and their officers combined and conspired to restrain trade in pink-tinted lenses for eyeglasses, contrary to Sections 1 and 3 of the Act. The complaint was sustained as to Soft-Lite and its officers and was dismissed as to Bausch & Lomb and its officers. On appeal the Supreme Court modified the decree against Soft-Lite and, as modified, affirmed it.

The opinion, delivered by Mr. Justice REED, details the selling arrangements between Bausch & Lomb as manufacturer of lenses, its exclusive sale of the Soft-Lite lenses to the Soft-Lite Company and the arrangements which Soft-Lite maintains with the wholesalers and retailers for the distribution of the lenses and the control of prices. The effects of the arrangements in relation to the Sherman Act were summarized in the judgment of the District Court which found that Soft-Lite had violated the Act:

> (a) by entering into so-called "license" agreements with optical retailers which fix the prices at which said retailers shall sell Soft-Lite lenses; (b) by entering into so-called "license" agreements with optical retailers which provide that said retailers will sell such lenses only to the public; (c) by entering into agreements with wholesale customers which provide that the said wholesalers will sell Soft-Lite lenses and blanks only to retailers who are designated as "licensees" by the defendant Soft-Lite Lens Company, Inc.; (d) by entering into agreements with wholesale customers which fix the prices at which said wholesalers shall sell Soft-Lite lenses and blanks; (e) by entering into "Fair Trade" resale price maintenance contracts with said wholesalers as an integral part of the illegal distribution system of Soft-Lite blanks and lenses; and (f) by enforcing the agreements set forth in subdivisions (a) through (e) of this paragraph.

The reference in the District Court's findings to "Fair Trade" resale agreements is to agreements made after enactment of the Miller-Tydings Act which amends the Sherman Act to permit minimum prices for the resale of commodities bearing the trade-mark of the distributor in states where contracts of that description are legal in respect of intrastate transactions, the effect of the Miller-Tydings Act being to permit agreements in those states in respect of interstate commerce.

In approaching the legal questions involved, the Court remarks that its task is simplified by the appellant's recognition that the retail license provisions binding dealers to sell at locally prevailing prices and only to the public constitute illegal restraints. This left for the Court, chiefly, the question of the scope of the decree.

As to the arrangements with wholesalers, Soft-Lite urged that it was within its legal rights in refusing to sell to wholesalers who would not resell at prices fixed by Soft-Lite. Mr. Justice REED points out in this connection that while Soft-Lite may sell to wholesalers at prices satisfactory to itself, it may not control prices at which the wholesaler sells to its customers. The applicable rule is stated in the following language:

> Soft-Lite is the distributor of an unpatented article. It sells to its wholesalers at prices satisfactory to itself. Beyond that point it may not project its power over the prices of its wholesale customers by agreement. A distributor of a trade-marked article may not lawfully limit by agreement, express or implied, the price at which or the persons to whom its purchaser may resell, except as the seller moves along the route which is marked by the Miller-Tydings Act. . . . Even the additional protection of a copyright, . . . or of a patent . . . add nothing to a distributor's power to control prices of resale by a purchaser. The same thing is true as to restriction of customers.

Soft-Lite, relying upon certain prior decisions of the Court, urged that a simple refusal on its part to sell to customers who will not resell at prices fixed by it is permissible under the Sherman Act. The cases cited were examined and found to be inapplicable. Supporting the decree against the arrangement with the wholesalers, the opinion continues:

> So far as the wholesalers are concerned, Soft-Lite and its officers conspired and combined among themselves and with at least some of the wholesalers to restrain commerce by designating selected wholesalers as sub-distributors of Soft-Lite products, by fixing resale prices and by limiting the customers of the wholesalers to those recommended by the wholesalers and approved by Soft-Lite—all in violation of the Sherman Act. This finding justifies the order directing cancellation of the wholesale arrangements and cessation by Soft-Lite of systematic price suggestions. Whether this conspiracy and combination was achieved by agreement or

by acquiesence of the wholesalers coupled with assistance in effectuating its purpose is immaterial.

Objection is also made to the decree because it nullifies resale price maintenance contracts made with wholesalers under authority of the Miller-Tydings amendment. Overruling this objection, the Court says:

> The District Court said that these contracts "came into existence as a patch upon an illegal system of distribution" and as an integral part of that system. As some wholesalers do certain cutting and edging work on the blanks for sale to retailers who do not do this grinding for themselves, the "Fair Trade" contracts for fixing resale prices apply only to those sales, known as "stock" sales, where the lenses and blanks are resold in the same form in which they come from Soft-Lite. . . . We think that where a distribution system exists, prior to the making of such price maintenance contracts, which is illegal because of unallowable price-fixing contracts and where that illegality necessarily persists in part because a portion of the resales are not covered by the "Fair Trade" contracts, as just explained, subsequent price maintenance contracts, otherwise valid, should be cancelled, along with the invalid arrangements, in order that the ground may be cleansed effectually from the vice of the former illegality. Equity has power to eradicate the evils of a condemned scheme by prohibition of the use of admittedly valid parts of an invalid whole.

The decree was modified by striking out certain provisions thereof requiring the defendant to submit reports to the Department of Justice with respect to any matters contained in the judgment as from time to time might be necessary for the purpose of its enforcement. The government sought to have the decree extended against Soft-Lite so as to require it to file with the Court a written instrument providing that it will sell its product without discrimination, to any person offering to pay cash therefor. This would, of course, deprive Soft-Lite of its privilege of selecting its customers and the Court refuses to destroy this privilege and hence denies the extension as requested by the government.

Commenting on this, Mr. Justice REED says:

> The Sherman Act is intended to prevent unreasonable restraints of commerce. The Clayton amendment, 38 Stat. 731, outlawed agreements with customers which restricted the customer from dealing with the products of a competitor of the seller. Persons injured by unlawful restraints may recover threefold damages. The federal courts have jurisdiction of suits to enjoin violations. Congress has been liberal in enacting remedies to enforce the anti-monopoly statutes. But in no instance has it indicated an intention to interfere with ordinary commercial practices. In a business, such as Soft-Lite, which deals in a specialty of a luxury or near-luxury character, the right to select its customers may well be the most essential factor in the maintenance of the highest standards of service. We are, as the District Court apparently was, loath to deny to Soft-Lite this privilege of selection. . . . We have no reason to doubt that Soft-Lite will conform meticulously to the requirements of the decree. When it is shown to the trial court that it has not done so will be an appropriate time for the Government to urge this addition to the decree.

The Court was evenly divided as to the dismissal of the complaint against Bausch & Lomb.

Mr. Justice JACKSON did not participate.

The case was argued by Mr. Assistant Attorney General Berge for the Government and by Mr. Whitney North Seymour for Soft-Lite.

Fair Labor Standards Act—Definition of "Work" and "Workweek"—Portal to Portal Pay in Iron Mines

Under this Act "work" and "workweek" are not precisely defined. Upon the record in this case it is held that traveling of miners in iron mines between the portal and the working face is "work" and that time spent in that travel constitutes part of the "workweek" and is compensable as such.

Tennessee Coal, Iron & Railroad Company v. *Muscoda Loan No. 123, etc., et al.; Sloss-Sheffield Steel & Iron* v. *Sloss Red Ore Local No. 109, etc., et al.; Republic Steel* v. *Raimund Local No. 121, etc. et al.* 88 L. ed. Adv. Ops. 610, 64 Sup. Ct. Rep. 698; U. S. Law Week 4230. (No. 409, argued January 13 and 14, decided March 27, 1944).

The portal to portal pay question in certain iron ore mines is passed on in this case under the Fair Labor Standards Act. The employers, iron ore mining companies, brought actions for declaratory judgment to determine whether time spent by iron ore miners traveling under ground in mines to and from the "working face" constitutes work or employment for which compensation must be paid under the terms of the Act. Certain unions and their officials, representing employees, were named as defendants and the Administrator of the Wage and Hour Division of the Department of Labor intervened. It was conceded that if the underground travel constitutes work, the statutory maximum workweek was exceeded and overtime should be paid for at one and one-half times the regular rate.

After extended hearings, the District Court found that travel time "bears in a substantial degree every indicia of the worktime: supervision by the employer, physical and mental exertion, activity necessary to be performed for the employers' benefit and conditions peculiar to the occupation of mining." It ruled, therefore, that underground travel time, as well as time spent obtaining and returning tools, lamps and carbide and checking in and out, must be included in the workweek. The Circuit Court affirmed as to travel time but modified the judgment to exclude time spent in activity at the surface.

On certiorari this ruling was affirmed by the Supreme Court by a divided bench. Mr. Justice MURPHY delivered the prevailing opinion. In considerable detail the opinion describes the characteristics of the underground travel. The employer's supervision is noted; the considerable hazards incident to the travel are stressed; and the offensive conditions under which it must take place are also alluded to.

In approaching the determination of the legal question, the opinion points out that the issue involved

can be solved only by discarding formalities and adopting a realistic attitude, and by recognition of the fact that human beings are being dealt with under a statute remedial in purpose and intended to secure to the workers the fruits of their toil and exertion. Interpreting the statute in its application to the present case, Mr. Justice MURPHY states:

> Such a statute must not be interpreted or applied in a narrow, grudging manner. Accordingly we view Sections 7(a), 3(g) and 3(j) of the Act as necessarily indicative of a Congressional intention to guarantee either regular or overtime compensation for all actual work or employment. To hold that an employer may validly compensate his employees for only a fraction of the time consumed in actual labor would be inconsistent with the very purpose and structure of those sections of the Act. It is vital, of course, to determine first the extent of the actual workweek. Only after this is done can the minimum wage and maximum hour requirements of the Act be effectively applied. And, in the absence of a contrary legislative expression, we cannot assume that Congress here was referring to work or employment other than as those words are commonly used—as meaning physical or mental exertion (whether burdensome or not) controlled or required by the employer and pursued necessarily and primarily for the benefit of the employer and his business.
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> Viewing the facts of this case as found by both courts below in the light of the foregoing considerations, we are unwilling to conclude that the underground travel in petitioners' iron ore mines cannot be construed as work or employment within the meaning of the Act. The exacting and dangerous conditions in the mine shafts stand as mute, unanswerable proof that the journey from and to the portal involves continuous physical and mental exertion as well as hazards to life and limb. And this compulsory travel occurs entirely on petitioners' property and is at all times under their strict control and supervision.
>
> Such travel, furthermore, is not primarily undertaken for the convenience of the miners and bears no relation whatever to their needs or to the distance between their homes and the mines. Rather the travel time is spent for the benefit of petitioners and their iron ore mining operations. The extraction of ore from these mines by its very nature necessitates dangerous travel in petitioners' underground shafts in order to reach the working faces, where production actually occurs. Such hazardous travel is thus essential to petitioners' production. It matters not that such travel is, in a strict sense, a non-productive benefit. Nothing in the statute or in reason demands that every moment of an employee's time devoted to the service of his employer shall be directly productive. Section 3(j) of the Act expressly provides that it is sufficient if an employee is engaged in a process or occupation necessary to production. Hence employees engaged in such necessary but not directly productive activities as watching and guarding a building, waiting for work, and standing by on call have been held to be engaged in work necessary to production and entitled to the benefits of the Act. Iron ore miners travelling underground are no less engaged in a "process or occupation" necessary to actual production. They do more than "stand and wait." . . . Theirs is a fossorial activity bearing all the indicia of hard labor.

The employers relied upon the custom in the industry and upon collective bargaining agreements excluding travel time from the workweek and argued that since the Act contains no specific provision regarding underground travel in mines, Congress must have intended to perpetuate existing customs or leave the matter to future collective bargaining. This argument is rejected on the finding of the District Court against the existence of any such custom or collective bargaining agreements. However, the Court goes farther and concludes that prior customs and contracts are immaterial because, in the language of the opinion:

> The Fair Labor Standards Act was not designed to codify or perpetuate those customs and contracts which allow an employer to claim all of an employee's time while compensating him for only a part of it. Congress intended, instead, to achieve a uniform national policy of guaranteeing compensation for all work or employment engaged in by employees covered by the Act. Any custom or contract falling short of that basic policy, like an agreement to pay less than the minimum wage requirements, cannot be utilized to deprive employees of their statutory rights.

Mr. Justice FRANKFURTER delivered a separate concurring opinion emphasizing that the legal question involved lies within a narrow compass. He points out that Congress did not explicitly define "workweek" but left it to be determined by judicial proceedings. In view of the extensive evidence and the findings of both lower courts that the activities of the employees constituted part of their workweek, affirmance of the judgment was demanded.

Mr. Justice JACKSON also delivered a separate concurring opinion setting forth his view that apparently Congress intended that what was a workweek in fact should also be a workweek in law. In view of the concurrent findings of the lower courts he concluded that the ruling that travel time was part of the workweek seemed manifest and should be affirmed on the controlling facts.

Mr. Justice ROBERTS delivered a dissenting opinion in which the CHIEF JUSTICE concurred. The question presented and the proper legal approach to it are stated in this opinion as follows:

> The question for decision in this case should be approached not on the basis of any broad humanitarian prepossessions we may all entertain, not with a desire to construe legislation so as to accomplish what we deem worthy objects, but in the traditional and, if we are to have a government of laws, the esssential attitude of ascertaining what Congress has enacted rather than what we wish it had enacted.
>
> Much of what is said in the opinion, in my view, disregards this fundamental function of the judicial process and relies on considerations which have no place in the solution of the issue presented.
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> What did Congress mean when it said, in Sec. 7(a) of the Fair Labor Standards Act, that "No employer shall . . . employ any of his employees . . . *for a workweek* longer than forty hours . . . unless such employee receives compensation" for overtime at a specified rate? No other issue is presented.
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> The materials for decision are those to which resort always has been had in ascertaining the meaning of a statute. They are the mischief to be remedied, the purpose of Congress in the light of the mischief, and the means adopted to promote that purpose. These are not obscure in this instance.

The case was argued by Mr. Nathan L. Miller for Tennessee Coal, by Mr. Crampton Harris for Muscoda Local No. 123, by Mr. Solicitor General Fahy for Wage and Hour Division and by Mr. Borden Burr for the Tennessee Coal Co. and case submitted by Mr. E. L. All, Mr. S. M. Bronaugh, and Mr. William B. White for Sloss-Sheffield Steel & Iron Co., and by Mr. T. F. Patton, Mr. R. T. Rives and Mr. Borden Burr for Republic Steel Corp.

National Labor Relations Act—Duty to Bargain Collectively—Unfair Labor Practice in Interfering with Employees' Designation of Bargaining Agent

After a union had been selected by a majority of the employees in a bargaining unit as their exclusive representative, the majority shifted while negotiations were pending with the employer, and the new majority intimated to the employer that they would get out of the union if certain wage increases were granted. The employer granted the increases and then declined to negotiate further with the union, on the ground that it no longer represented the majority. The ruling of the Labor Board that this conduct on the part of the employer constitutes an unfair labor practice is sustained.

Medo Photo Supply Corporation v. *National Labor Relations Board*, 88 L. ed. Adv. Ops. 749; 64 Sup. Ct. Rep. 830; U. S. Law Week 4308. (No. 265, decided April 10, 1944).

This case presents questions as to whether the employer engaged in unfair labor practices contrary to § 8 (1) and (5) of the National Labor Relations Act. The employer recognized a labor union as the bargaining representative of its employees. Some of the employees thereafter approached the employer stating that they were dissatisfied with the union and would abandon it if wages were increased. The employer negotiating with them without intervention of the union, granted increases in wages and then refused to recognize or bargain with the union. The Board charged the employer with unfair labor practices and found that it had violated § 8 (1) and (5) of the Act, by interfering with the exercise by the employees of their right to bargain collectively as guaranteed by § 7 of the Act and by refusing to bargain with the union. The usual desist order was entered and the Circuit Court of Appeals overruled the employer's contention that the union at the time of the alleged unfair labor practices no longer represented the employees and directed compliance with the order. On certiorari, the Supreme Court affirmed in an order by the CHIEF JUSTICE.

The opinion reviews the findings of the Board which are held to have been supported by evidence. It appears that eighteen of twenty-six employees in the bargaining unit had designated the union as their bargaining agent, and the union had been recognized as the exclusive bargaining agent of that unit. A conference between the union representatives and the employer was to be held on June 9, 1941, to bargain collectively as to an increase in the wages. Two days before the conference twelve employees, members of the union, approached the manager and stated that they and six other employees had no desire to belong to the union if, through their own efforts they could obtain wage increases, a list of which they submitted. The manager declined to discuss the union but said that he would consider the wage increase with the company's president and asked the employees to return on June 9. On June 9 the manager, after a conference with the president, met a committee of four of the employees who had previously approached him and advised that the wages would be increased substantially as requested. The committee conveyed this information to the other employees who agreed to accept it. The committee then informed the manager of this, and that the employees felt that they did not need the union and would rather stay out. The committee then notified the union that the employees no longer desired the union to represent them. The union representative was informed later in the day by the employees' attorney that he understood that the union no longer represented a majority of the employees and he declined to negotiate unless it were established by an election that the union did represent a majority. However, the Board concluded that the employees had not revoked their designation of the union as a bargaining agent before the wage increases were promised, that the increases were induced by negotiations before repudiation of the union, that the decision to increase wages was induced by the employees' offer to get out of the union if the raises were granted, and that the defection from the union was induced by the employer's dealing directly with the employees.

The Supreme Court in affirming the judgment rejects the grounds of decision advanced by the majority and concurring opinions of the Circuit Court and accepts the grounds relied upon by the Board. The basis of the Court's decision is thus explained in the opinion:

> The National Labor Relations Act makes it the duty of the employer to bargain collectively with the chosen representatives of his employees. The obligation being exclusive, see § 9 (a) of the Act, 29 U. S. C. § 159 (a), it exacts "the negative duty to treat with no other." . . . Petitioner, by ignoring the union as the employees' exclusive bargaining representative, by negotiating with its employees concerning wages at a time when wage negotiations with the union were pending, and by inducing its employees to abandon the union by promising them higher wages, violated § 8 (1) of the Act, which forbids interference with the right of employees to bargain collectively through representatives of their own choice.
>
> That it is a violation of the essential principle of collective bargaining and an infringement of the Act for the employer to disregard the bargaining representative by negotiating with individual employees, whether a majority or a minority, with respect to wages, hours and working conditions was recognized by this court in *J. I. Case Co.* v. *Labor Board*, No. 67, 1943 Term;

The Court rejects the contention of the petitioner that it would be equally an unfair labor practice to refuse the wage increases as to grant them, for that would influence the employees to stay in the union, instead of getting out. As to this, the opinion points out that both consequences could be avoided by the

employer following its statutory duty by refusing to negotiate with anyone other than the designated bargaining agent.

Mr. Justice ROBERTS dissented without opinion.

Mr. Justice RUTLEDGE delivered a dissenting opinion in which he emphasizes that the view that the record discloses is not that of an intermeddling employer but one who had sought to do no more than meet the employees' wishes freely formed and freely stated and at the same time to comply with the applicable law. Emphasis is placed upon the point that the bargaining representative is merely an agent, that the agency was not irrevocable, and that the employees had right to revoke it and had revoked it by taking the matter back into their own hands. In elaboration of this, Mr. Justice RUTLEDGE says:

> Unless a designated union acquires, by its selection, a thraldom over the men who designate it analogous to the power acquired by one who has a "power coupled with an interest," unbreakable and irrevocable by him who gave it, it would seem that any powers the union may acquire by virtue of the designation would end whenever those who confer them and on whose behalf they are to be exercised take them back of their own accord into their own hands and exercise them for themselves. And this should be true, whether or not previous notice is given to the union and whether or not the subject matter of the resumption may include, as one consequence of the dealing, the possible continuance of the agency. For it is the very taking back of the right to deal with their employer, not what he does in response to this, unless that creates some new pressure or influence not contemplated in the employees' freely made proposals, that shows the intent to destroy the agency. Dealing for themselves and dealing exclusively through the agent cannot coexist. The one wholly excludes the other and the real question becomes, which is to prevail, the agent's interest and right or the principal's, the union's or the employees'?
>
> I do not think Congress intended, by this legislation, to create rights in unions overriding those of the employees they represent. Nor did it require a special form or mode for ending a collective agency any more than for creating it. What Congress did was to give the designated union the exclusive right to bargain collectively as long as, and only as long as, a majority of the employees of the unit consent to its doing so. When that majority vanishes by the employees' voluntary action, whatever form this may take, and the fact is made unmistakably clear to the employer, it not only is no longer under duty to deal with the union; it comes under affirmative obligation not to do so. For otherwise it would be dealing with a representative not of the employees' choice.

In *Franks Bros. Company* v. *National Labor Relations Board*, 88 L. ed. Adv. Ops. 773; 64 Sup. Ct. Rep. 817; U. S. Law Week 4305. (No. 521, decided April 10, 1944.)

The question presented was whether the Board acted within its statutory authority in ordering the employer to bargain collectively with a union which had lost its majority after the employer had wrongfully refused to bargain with it. It appears that forty-five of eighty production and maintenance employees had designated a union as the bargaining representative, but the employer refused to bargain. An election was scheduled but before it was held the employer campaigned against the union whereupon the union withdrew its petition for an election and filed charges with the Board alleging unfair labor practices.

The Board, after hearings, found that unfair labor practices had been engaged in by the employer within the meaning of § 8 (1) and (5) of the Act. Meanwhile, personnel had changed so that the union was left with only thirty-five of the eighty employees in the unit, being less than a majority. The Board, however, found that the union's lack of a majority was not determinative of the remedy to be ordered and concluded that the only means by which a refusal to bargain can be remedied is an affirmative order requiring the employer to bargain with the union which represented a majority *at the time* the unfair labor practice was committed.

The Circuit Court upheld the Board and on certiorari the ruling was sustained by the Supreme Court in an opinion by Mr. Justice BLACK. The view of the Court is indicated in the following portion of the opinion:

> That determination the Board has made in this case and in similar cases by adopting a form of remedy which requires that an employer bargain exclusively with the particular union which represented a majority of the employees at the time of the wrongful refusal to bargain despite that union's subsequent failure to retain its majority. The Board might well think that, were it not to adopt this type of remedy, but instead order elections upon every claim that a shift in union membership had occurred during proceedings occasioned by an employer's wrongful refusal to bargain, racalcitrant employers might be able by continued opposition to union membership indefinitely to postpone performance of their statutory obligation. In the Board's view, procedural delays necessary fairly to determine charges of unfair labor practices might in this way be made the occasion for further procedural delays in connection with repeated requests for elections, thus providing employers a chance to profit from a stubborn refusal to abide by law. That the Board was within its statutory authority in adopting the remedy which it has adopted to forclose the probability of such frustrations of the Act seems too plain for anything but statement.
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> Contrary to petitioner's suggestion, this remedy, as embodied in a Board Order, does not involve any injustice to employees who may wish to substitute for the particular union some other bargaining agent or arrangement. For a Board order which requires an employer to bargain with a designated union is not intended to fix a permanent bargaining relationship without regard to new situations that may develop. . . . But, as the remedy here in question recognizes, a bargaining relationship once rightfully established must be permitted to exist and function for a reasonable period in which it can be given a fair chance to succeed.

The CHIEF JUSTICE did not participate in No. 521.

Case No. 265 was argued by Miss Ruth Weyand for the NLRB and by Mr. William E. Friedman for the Photo Supply Corporation.

Case No. 521 was argued by Mr. Alvin J. Rockwell for the NLRB and by Mr. Benjamin E. Gordon for Franks.

Constitutional Law—The Right of Citizens to Vote—The Extent to Which State Primary Elections are Governed by Law

The Texas Constitution and statutes give to party primaries such a relation to the election of federal officers, imposes such duties on election officers and vests such civil rights in the citizens of the state that participation in the party primaries, by any other resident citizen otherwise qualified cannot be denied on the ground of color. *Grovey* v. *Townsend* is overruled.

Smith v. *Allwright*, 88 L. ed. Adv. Ops. 701; 64 Sup. Ct. Rep. 757; U. S. Law Week 4279. (No. 51, argued November 10 and 11, 1943, decided April 3, 1944).

The petitioner, Lonnie E. Smith, a Negro citizen of Harris County, Texas, was excluded from the right to vote at a Democratic primary for Democratic candidates for the United States Senate and House of Representatives and for the Governor and other state officers. He brought suit against the election officials for $5,000 damages, alleging the violation of Sections 31 and 43 of Title 8 of the United States Code, in that he was deprived of rights secured by Sections 2 and 4 of Article I and the Fourteenth, Fifteenth and Seventeenth Amendments to the United States Constitution. The action was filed in the District Court of the United States for the Southern District of Texas. That court denied the relief sought and the Circuit Court of Appeals affirmed its action on the authority of *Grovey* v. *Townsend*, 295 U. S. 45. The Supreme Court granted certiorari to resolve a claimed inconsistency between the decision in the *Grovey* case and that of *United States* v. *Classic*, 313 U. S. 299. The Supreme Court reversed in an opinion delivered by Mr. Justice REED.

The provisions of the Constitution and statutes of Texas are first considered. They provide that "every person [with exceptions not here material] qualified by residence in the district or county 'shall be deemed a qualified elector.'" Primary elections for United States Senators, Congressmen and other officers are provided for by the statute and thereby the Democratic party was required to hold the primary. Of that provision, Mr. Justice REED says:

> The Democratic party of Texas is held by the Supreme Court of that state to be a "voluntary association," *Bell* v. *Hill*, 123 Tex. 531, 534, protected by Section 27 of the Bill of Rights, Art. 1, Constitution of Texas, from interference by the state except that:
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> "In the interest of fair methods and a fair expression by their members of their preferences in the selection of their nominees, the state may regulate such elections by proper laws." P. 545.

The opinion recites that on May 24, 1932, the Democratic party, in a State Convention, adopted a resolution still in force, reading as follows:

> Be it resolved that all white citizens of the State of Texas who are qualified to vote under the Constitution and laws of the state shall be eligible to membership in the Democratic party and, as such, are entitled to participate in its deliberations.

and it is said by virtue of the resolution the election officials refused to permit the petitioner to vote. Of that situation Mr. Justice REED says:

> Texas is free to conduct her elections and limit her electorate as she may deem wise, save only as her action may be affected by the prohibitions of the United States Constitution or in conflict with powers delegated to and exercised by the National Government. The Fourteenth Amendment forbids a state from making or enforcing any law which abridges the privileges or immunities of citizens of the United States and the Fifteenth Amendment specifically interdicts any denial or abridgement by a state of the right of citizens to vote on account of color. Respondents appeared in the District Court and the Circuit Court of Appeals and defended on the ground that the Democratic party of Texas is a voluntary organization with members banded together for the purpose of selecting individuals of the group representing the common political beliefs as candidates in the general election. As such a voluntary organization, it was claimed, the Democratic party is free to select its own membership and limit to whites participation in the party primary. Such action, the answer asserted, does not violate the Fourteenth, Fifteenth or Seventeenth Amendments as officers of government cannot be chosen at primaries and the Amendments are applicable only to general elections where governmental officers are actually elected. Primaries, it is said, are political party affairs, handled by party not governmental officers.

Referring to a prior decision of the Court, Mr. Justice REED says:

> The right of a Negro to vote in the Texas primary has been considered heretofore by this Court. The first case was *Nixon* v. *Herndon*, 273 U. S. 536. At that time, 1924, the Texas statute, Art. 3093a, afterwards numbered Art. 3107 (Rev. Stat. 1925) declared "in no event shall a Negro be eligible to participate in a Democratic Party primary election in the State of Texas." Nixon was refused the right to vote in a Democratic primary and brought suit for damages against election officers under R. S. § 1979 and 2004, the present sections 43 and 31 of Title 8, U. S. C., respectively. It was urged to this Court that the denial of the franchise to Nixon violated his constitutional rights under the Fourteenth and Fifteenth Amendments. Without consideration of the Fifteenth, this Court held that the action of Texas in denying the ballot to Negroes by statute was in violation of the equal protection clause of the Fourteenth Amendment and reversed the dismissal of the suit.

The opinion states that the statutory provision above referred to was reenacted by the Texas legislature, but that power was given to the State Executive Committee of a party to prescribe the qualifications of its members for voting or other participation; that the State Executive Committee of the Democratic Party adopted a resolution that white Democrats and none other might participate in the primary elections of the party. Litigation followed and the Supreme Court declined to intervene on the ground that the Committee action was deemed to be state action and invalid as discriminatory under the Fourteenth Amendment. The test was said to be whether the Committee operated as a representative of the state in the discharge of the state's authority, but the question of the inherent power of a political party in Texas "without restraint by any law to determine its own membership" was left open. *Nixon* v. *Condon*, 286 U. S. 73, 84, 85.

Mr. Justice REED proceeded with the analysis of

other decisions which came before the Court involving the right of Negroes to participate in primary elections in that state. At the conclusion of the examination of those cases, Mr. Justice REED says:

> It may now be taken as a postulate that the right to vote in such a primary for the nomination of candidates without discrimination by the state, like the right to vote in a general election, is a right secured by the Constitution. . . . By the terms of the Fifteenth Amendment that right may not be abridged by any state on account of race. Under our Constitution, the great privilege of choosing his rulers may not be denied a man by the state because of his color.
>
> We are thus brought to an examination of the qualifications for Democratic primary electors in Texas, to determine whether state action or private action has excluded Negroes from participation. Despite Texas' decision that the exclusion is produced by private or party action, *Bell* v. *Hill, supra*, federal courts must for themselves appraise the facts leading to that conclusion. It is only by the performance of this obligation that a final and uniform interpretation can be given to the Constitution, the "supreme Law of the Land."

The method employed by the election authorities of Texas, under the statutory provisions of that state, are next examined. It is pointed out that Texas requires electors in a primary to pay a poll tax and that every person who pays that tax and is otherwise qualified is an acceptable voter for the primary. The statute requires the election of the county officers of a party, including the county executive committee, the county chairmen and other primary election officers, delegates to county conventions and to district and state conventions. No convention may place in platform or resolution any demand for specific legislation without endorsement by the voters at a primary and it is said "Texas thus directs the selection of all party officers."

Summarizing this examination of the Texas primary system, Mr. Justice REED says:

> We think that this statutory system for the selection of party nominees for inclusion on the general election ballot makes the party which is required to follow these legislative directions an agency of the state in so far as it determines the participants in a primary election. The party takes its character as a state agency from the duties imposed upon it by state statutes; the duties do not become matters of private law because they are performed by a political party.
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> * * *
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> The United States is a constitutional democracy. Its organic law grants to all citizens a right to participate in the choice of elected officials without restriction by any state because of race. This grant to the people of the opportunity for choice is not to be nullified by a state through casting its electoral process in a form which permits a private organization to practice racial discrimination in the election. Constitutional rights would be of little value if they could be thus indirectly denied.

Referring to a former decision of the Court, Mr. Justice REED says:

> The privilege of membership in a party may be, as this Court said in *Grovey* v. *Townsend*, 295 U. S. 45, 55, no concern of a state. But when, as here, that privilege is also the essential qualification for voting in a primary to select nominees for a general election, the state makes the action of the party the action of the state. In reaching this conclusion we are not unmindful of the desirability of continuity of decision in constitutional questions. However, when convinced of former error, this Court has never felt constrained to follow precedent. In constitutional questions, where correction depends upon amendment and not upon legislative action this Court throughout its history has freely exercised its power to reexamine the basis of its constitutional decisions. This has long been accepted practice, and this practice has continued to this day. This is particularly true when the decision believed erroneous is the application of a constitutional principle rather than an interpretation of the Constitution to extract the principle itself. Here we are applying, contrary to the recent decision in *Grovey* v. *Townsend*, the well established principle of the Fifteenth Amendment, forbidding the abridgement by a state of a citizen's right to vote. *Grovey* v. *Townsend* is overruled.

Mr. Justice FRANKFURTER concurred in the result.

Mr. Justice ROBERTS filed a dissenting opinion in which he refers to what he said in the *Southern Steamship Company* case with respect to what he called "the present policy of the Court freely to disregard and to overrule considered decisions and the rules of law announced in them." He then takes up the judicial history which forms the background of *Grovey* v. *Townsend*, now overruled and says:

> The reason for my concern is that the instant decision, overruling that announced about nine years ago, tends to bring adjudications of this tribunal into the same class as a restricted railroad ticket, good for this day and train only. I have no assurance, in view of current decisions, that the opinion announced today may not shortly be repudiated and overruled by justices who deem they have new light on the subject. In the present term the court has overruled three cases.
>
> It is regrettable that in an era marked by doubt and confusion, an era whose greatest need is steadfastness of thought and purpose, this Court, which has been looked to as exhibiting consistency in adjudication, and a steadiness which would hold the balance even in the face of temporary ebbs and flows of opinion, should now itself become the breeder of fresh doubt and confusion in the public mind as to the stability of our institutions.

The case was argued by Mr. Thurgood Marshall and Mr. William H. Hastie for Smith. George W. Barcus, Assistant Attorney General of Texas, and Gerald C. Mann, Attorney General, as *amicus curiae*, by special leave of court; no appearance for respondents.

Practice and Procedure—Federal Rules of Civil Procedure, (56 S. C.)—Summary Judgments

Summary judgment is a procedural device to terminate litigation if on the pleadings and proof the controlling question is one of law only and there is no substantial question of fact to be decided by a jury.

The Summary Judgment Rule (56 FRCP) permits affidavits, depositions, and relevant portions of the record to be filed and considered in the determination of whether or not the question is one of law or fact.

In this case it was held that the trial court, and the reviewing court might consider and determine whether the affidavits offered by the defendant in support of the motion for summary judgment were sufficient to establish the contention that the defendant was entitled to a summary judgment in his favor, notwithstanding a verdict and other record evidence to the contrary.

Sartor, et al. v. *Arkansas Natural Gas Corporation*, 88 L. ed., Adv. Ops. 597; 64 Sup. Ct. Rep. 724; U. S. Law Week 4227. (No. 232, decided March 27, 1944.)

The petitioners are owners of land in Louisiana. In

1897 they leased their lands for natural gas development to respondents. For brevity and clarity the petitioners will be here called, "lessors" and the respondents, "lessees."

The lease provides that lessor shall be paid the market price at the well, or the value of one-eighth, but no less than three cents per 1000 cubic feet. For many years settlements were made at the three-cent rate. The suit was based upon the contention that during the latter part of the period, the market price was considerably above three cents. The litigation ran along for a decade. There were four adjudications including two trials in district court and four decisions by courts of appeal. The litigation was finally determined in favor of the lessee on a motion for summary judgments and the question in the case is whether or not the summary judgment properly disposed of the controversy. The issues as to the gas produced between March 20, 1930, and the commencement of the action were submitted to a jury which returned a verdict finding that the average price of gas at the well during that period was .0445 per 1000 cubic feet.

The Circuit Court of Appeals affirmed so far as the verdict of the jury fixed the market value of the gas, but the District Court had held that the plaintiff's claim for the earlier period was based on the statute of limitations. On that issue the case was reversed and remanded for a new trial.

Thereupon the lessee filed a motion for summary judgment in its favor under Rule 56. The motion was granted and the court of appeals affirmed. Certiorari was allowed and the Supreme Court reversed the judgment of the court below.

Mr. Justice JACKSON delivered the opinion of the Court.

As to the basis for the motion for summary judgment Mr. Justice JACKSON says:

> The defendant asked a summary judgment because it averred "there exists no reasonable basis for dispute" that during the period in question there was a market price at the wells and that it did not exceed 3c per m.c.f. To sustain this position it filed affidavits, a stipulation of facts, and several exhibits. The plaintiffs resisted on the ground that the motion was inadequately supported on the face of defendant's papers. An affidavit by plaintiffs' counsel analyzed defendant's affidavits in the light of testimony given by the witnesses at prior trials; asserted that all were interested witnesses whose testimony was rejected on previous occasions; recited previous verdicts in the case; and setting forth affiant's experience in ten trials of this character arising out of leases in this field, asserted his knowledge of the market prices there and declared it to be more than 5c per m.c.f. at the wellhead.
>
> It should be observed that the entire controversy here turns on questions of valuation. The only issue relates to market price or value of plaintiffs' gas at the time and place of delivery. If there has been no damage in the sense of failure to pay the full market price, then there is no cause of action, and if there has been damage in such sense, there is a cause of action.

The opinion proceeds to examine and construe the summary judgment rule. In so doing he examined the evidence introduced in support of the motion for summary judgment, declared that the affidavits filed in support of that motion were by officers of the lessee; that they were interested parties; that some of them had testified before the jury on the issue of market price, and the jury had disregarded their evidence in reaching a verdict of a higher market value than the witnesses alleged in their affidavits.

Mr. Justice JACKSON summarizes the features of the defendant's motion papers as follows:

> 1. The only evidence in support of defendant's contention as to the wellhead market price is opinion testimony of experts.
>
> 2. Each of them either is an officer of the defendant or is a lessee, or is an employee or officer of a lessee corporation, engaged like defendant in gas production, and each certainly is open to inquiry as to the truth of plaintiffs' attorney's sworn statements that each has interest in or bias as to the subject matter of this litigation.
>
> 3. Every one of defendant's witnesses had testified to the same general effect on the trial of the claim wherein the jury found against the testimony and the Circuit Court of Appeals affirmed the verdict.
>
> 4. Defendant undertook by its motion to show that it was beyond controversy that the 3c price prevailed constantly and not as a matter of averages for the entire period ended March 19, 1930, although prior trial had conclusively adjudged that on March 20, 1930, and thereafter the price or value averaged 4.45c as recited in the jury verdict. No evidence is presented of any sudden change, and no fact is offered to explain any change in the market and price of such gas. In fact any change is inconsistent with defendants' position in the former trial, which was that at no time in either period had the market exceeded 3c.

The final conclusion of the Court was stated by Mr. Justice JACKSON as follows:

> We think the defendant failed to show that it is entitled to judgment as matter of law. In the stipulation, the bulletin, the affidavit of the plaintiffs' attorney and the admission of its witnesses, there is some, although far from conclusive, evidence of a market price or a value, under the rules laid down by the Court of Appeals, that supports plaintiffs' case. It may well be that the weight of the evidence would be found on a trial to be with defendant. But it may not withdraw these witnesses from cross-examination, the best method yet devised for testing trustworthiness of testimony. And their credibility and the weight to be given to their opinions is to be determined, after trial, in the regular manner.

The CHIEF JUSTICE filed a dissenting opinion in which Mr. Justice REED joined.

> The basis of that dissent rests upon the postulate that, "the two courts below have correctly applied the state law governing the right to recover royalties on the particular type of gas lease here in question." . . . "on the motion for summary judgment, the single issue is whether the petitioner" (the lessors) "had any evidence by which they could sustain the burden resting on them of showing . . . a market price or value of gas in excess of 3c at the wellhead."

By a careful examination of the record he reveals his conviction that the lessors have not carried that burden.

Closing the dissent the CHIEF JUSTICE says:

On this state of the record both courts below have held that the issue whether petitioners have any proof tending to support the burden which rests on them to show market price or value at the wellhead in excess of 3c, must be resolved against them. I think that the courts' conclusion is correct; that they properly applied the summary judgment procedure, and that the judgment should be affirmed.

The case was argued by Mr. Gilbert P. Bullis, for Sartor, and by Mr. Elias Goldstein, for the Arkansas Natural Gas Corporation.

Fraudulent Misrepresentation—The Twelfth and Thirteenth Amendments—The Anti-Peonage Act

The Florida statute which makes the obtaining of advance payments on a contract of employment fraudulently intending not to render the promised service, and making the failure to render the service, prima facie evidence of fraudulent intent, offends against the Thirteenth and Fourteenth Amendments and is invalid. The prima facie evidence provision is so inseparably joined with the rest of the Act, both in legislative purpose and practical effect that it cannot be regarded as separable.

Pollock v. *Williams*, 88 L. ed. Adv. Ops. 722; 64 Sup. Ct. Rep. 792; U. S. Law Week 4291, (No. 345, decided April 10, 1944).

Florida has a statute making it a misdemeanor to procure advances of wages on promise to work, intending not to keep that promise. The statute also makes failure to perform the promised labor for which payment has been advanced, *prima facie* evidence of intent to defraud.

One Pollock was charged with obtaining an advance of five dollars on a promise to render service, intending not to do so, and intending to injure and defraud, contrary to the statute. Pollock was arrested, and on trial in the County Court, pleaded guilty. He was fined $100, sentenced on default of payment to serve 60 days in jail and immediately committed. He applied to the Circuit Court for a writ of habeas corpus. His petition alleged that at the trial he was not informed and did not know that he was entitled to be represented by counsel; that he did not understand the nature of the proceeding in the county court, nor his rights, and that he had no money with which to employ a lawyer.

The Circuit Court held the statute unconstitutional and discharged the prisoner. The Supreme Court of Florida reversed. On appeal by the accused, the Supreme Court of the United States reversed.

The Supreme Court of Florida did not hold valid the provision of the Florida statute holding failure to appear and render the agreed service was *prima facie* evidence of fraudulent intent, but that court and the appellants on argument contended that because of the plea of guilty the section of the statute which made failure to work, *prima facie* evidence of fraudulent intent, "was not in fact brought into play, and that with the severance of that presumption the section of the statute which denounces the crime, is inoperative. The same position was taken by the appellants on the argument on the appeal to the Supreme Court.

The opinion of the Court was delivered by Mr. Justice JACKSON. In the opening subdivision of the opinion, he said:

> These issues emerge from an historical background against which the Florida legislation in question must be appraised.
>
> The Thirteenth Amendment to the Federal Constitution, made in 1865, declares that involuntary servitude shall not exist within the United States and gives Congress power to enforce the article by appropriate legislation. Congress on March 2, 1867, enacted that all laws or usages of any state "by virtue of which any attempt shall hereafter be made to establish, maintain, or enforce, directly or indirectly, the voluntary or involuntary service or labor of any persons as peons, in liquidation of any debt or obligation, or otherwise," are null and void, and denounced it is a crime to hold, arrest, or return a person to the condition of peonage. Congress thus raised both a shield and a sword against forced labor because of debt.

The historical background to which Mr. Justice JACKSON referred is then examined. Florida and Alabama have passed similar statutes, intended to meet the situation created by the conduct of those who obtained money from a prospective employer on the promise of performing service, intending to get an advance payment for services to be rendered and intending also not to perform the work. The essence of such a crime was the existence of an intent to defraud by getting money without working for it. The *prima facie* provision was incorporated into the Act, because of the difficulty of proving fraudulent intent. The decisions holding that provision unconstitutional and void, the amendment of the state statutes in an attempt to meet the Supreme Court's decision and still retain some of the advantage of a presumption of guilt, were examined and analyzed.

Turning to an examination of the record, Mr. Justice JACKSON says:

> What the prisoner actually did that constituted the crime cannot be gleaned from the record. The charge is cast in the words of the statute and is largely a conclusion. It affords no information except that Pollock obtained $5 from a corporation in connection with a promise to work which he failed to perform, and that his doing so was fraudulent. If the conclusion that the prisoner acted with intent to defraud rests on facts and not on the *prima facie* evidence provisions of the statute, none are stated in the warrant or appear in the record. None were so set forth that he could deny them. He obtained the money on the 14th of October, 1942, and the warrant was not sought until January 2, 1943. Whether the original advancement was more or less than $5, what he represented or promised in obtaining it, whether he worked a time and quit, or whether he never began work at all are undisclosed. About all that appears is that he obtained an advancement of $5 from a corporation and failed to keep his agreement to work it out. He admitted those facts and the law purported to supply the element of intent. He admitted the conclusion of guilt which the statute made *prima facie* thereon. He was fined $20 for each dollar of his debt, and in default of payment was required to atone for it by serving time at the rate of less than 9¢ per day.

From the vagueness of the charges and the lack of

proof it was declared that there was no reason for doubt that the "presumption provision had a coercive effect on producing the plea of guilty."

The opinion also emphasizes the fact that Florida had other statutes under which the obtaining of money by fraudulent pretence could be punished. On this point Mr. Justice JACKSON says:

> Florida has a general and comprehensive statute making it a crime to obtain money or property by false pretenses or commit "gross fraud or cheat at common law." These appear to authorize prosecution for even the petty amount involved here.

The opinion then comments on the repeated efforts of Florida to escape the effect of the courts' decisions that the "presumption provision of the statute was in conflict with the Constitution. On this point Mr. Justice JACKSON says:

> We think that a state which maintains such a law in face of the court decisions we have recited may not be heard to say that a plea of guilty under the circumstances is not due to pressure of its statutory threat to convict him on the presumption.
>
> As we have seen, Florida persists in putting upon its statute books a provision creating a presumption of fraud from the mere nonperformance of a contract for labor service three times after the courts ruled that such a provision violates the prohibition against peonage. To attach no meaning to such action, to say that legally speaking there was no such legislation is to be blind to fact.

Having finally denounced the validity of the Florida Act and the persistence with which the legislature had resisted controlling decisions of the highest judicial tribunal, the opinion gave quite a different tone to the attitude of the Florida Supreme Court. Here Mr. Justice JACKSON says:

> We are induced by the evident misunderstanding of our decisions by the Florida Supreme Court, in what we are convinced was a conscientious and painstaking study of them, to make more explicit the basis of constitutional invalidity of this type of statute.
>
> The undoubted aim of the Thirteenth Amendment as implemented by the Antipeonage Act was not merely to end slavery but to maintain a system of completely free and voluntary labor throughout the United States. Forced labor in some special circumstances may be consistent with the general basic system of free labor. For example, forced labor has been sustained as a means of punishing crime, and there are duties such as work on highways, which society may compel. But in general the defense against oppressive hours, pay, working conditions, or treatment is the right to change employers.

The legislative history of the Thirteenth and Fourteenth amendments and of the "Antipeonage Act" is reviewed and among other things the following is disclosed:

> In 1910, in response to a resolution of the House of Representatives, the Immigration Commission reported the results of an investigation of peonage among immigrants in the United States. It found that no general system of peonage existed, and that sentiment did not support it anywhere. On the other hand, it found sporadic cases of probable peonage in every state in the Union except Oklahoma and Connecticut. It pointed out that "there has probably existed in Maine the most complete system of peonage in the entire country," in the lumber camps. In 1907, Maine enacted a statute, applicable only to lumber operations but in its terms very like the section of the Florida statute we are asked to separate and save. The law was enforcible in local courts not of record. The Commission pointed out that the Maine statute, unlike that of Minnesota and the statutes of other states in the West and South, did not contain a *prima facie* evidence provision. But as a practical matter the statute led to the same result.

Still speaking to the Florida Supreme Court the opinion cites and analyzes all the pertinent decisions of state and federal courts including those of Florida.

The opinion ends as follows:

> We impute to the Legislature no intention to oppress, but we are compelled to hold that the Florida Act of 1919 as brought forward on the statutes as §§ 817.09 and 817.10 of the Statutes of 1941 are, by virtue of the Thirteenth Amendment and the Antipeonage Act of the United States, null and void. The judgment of the court below is reversed and the cause is remanded for further proceedings not inconsistent with this opinion.

Mr. Justice REED filed a dissenting opinion, in which the CHIEF JUSTICE joined.

The grounds of dissent are made clear from the following excerpts:

> This court now holds, as it has held before, that when the presumption section is applied in the trial of a criminal charge under the substantive section, both are invalid and a conviction thus obtained by resort to a presumption of law which may be false in fact, cannot be sustained. But the Court's opinion fails to bridge the gap between these earlier decisions of the Court and its present conclusion that the substantive provisions, when resorted to alone as the basis for a sentence on an admission of guilt, is likewise invalid, because of the mere existence of the presumption section.
>
> We are given no constitutional reason for saying that a state may not punish the fraudulent procurement of an advance of wages as well as the giving of a check drawn on a bank account in which there are no funds, or any other course of conduct which the common law has long recognized, as the procuring of money or property by fraud or deceit. . . .
>
> Not only has the Supreme Court of Florida held as a matter of law that the two sections of the statute now before us are separable, but it is obvious that as a matter of law the presumption section is not called into operation where, as here, the accused does not go to trial but pleads guilty to the substantive charge. In rejecting these conclusions as to the separability of the two sections, we take it that the Court is not rejecting the Supreme Court of Florida's interpretation of the Florida statute, but rather that it concludes as a matter of fact that the presumption section is so all-pervasive in its operation that we must conclude without further proof that it so operated in petitioner's case as to coerce his plea of guilty to the charge of violating the substantive section.
>
> But neither the present record nor any facts of which we can take judicial notice lend support to that conclusion. . . .
>
> We cannot conclude that a statute which merely punishes a fraud in a contract, as the first section does if considered alone, violates the provision of the Thirteenth Amendment against involuntary servitude or is null and void under 8 U. S. C. § 56 because it is an attempt to enforce compulsory service for a debt. Conviction under the statute results not in peonage, work for a debt, but in punishment for crime, probably in the county work house. . . . The conception

embodied in the Court's opinion that the fear of conviction for his fraud might compel the defendant to work as agreed is without basis in the record. At any rate fear of punishment is supposed to be a deterrent to crime.

The conviction should be affirmed.

The case was argued by Mr. Raymer F. Maguire for Pollock and by Mr. John C. Wynn for Williams.

Taxation—Deduction for Interest—Excess Interest Dividends Paid by Life Insurance Company

Amounts which may be declared or withheld by the taxpayer at its own election do not constitute "interest," even though paid with respect to an unconditional underlying obligation.

The Equitable Life Assurance Society of the United States v. *Commissioner of Internal Revenue*, 88 L. ed. Adv. Ops. 603; 64 Sup. Ct. Rep. 239; U. S. Law Week 4251. (No. 492, argued March 8 and 9, decided March 27, 1944).

The taxpayer, a mutual life insurance company, issued policies which gave to the insured or to the beneficiary the right, under supplementary contracts, to have the company hold the face amount of the policies upon their maturity under one or more of several optional modes of settlement in lieu of payment in a lump sum. These contracts provided that "If in any year the Society declares" that funds held under these options shall receive interest in excess of 3% per annum, the payments under them "shall be increased for that year by an Excess Interest Dividend as determined and apportioned by the Society." The company paid during the taxable year an amount which had accrued during the year at the rate which had been declared by its board of directors at the beginning of that year. It sought a deduction for that amount as "interest" under Rev. Act of 1932 § 203 (a) (8), which is substantially the same as the present I. R. C. § 23 (b) relating to taxpayers generally. The Tax Court denied the deduction (44 B. T. A. 293), and the Circuit Court of Appeals affirmed (137 F. (2nd) 623). The Supreme Court granted certiorari because of conflict.

In an opinion by Mr. Justice DOUGLAS, the decision was affirmed on the ground that the payments did not constitute "interest" within the meaning of the statute:

> The "usual import" of the word interest is "the amount which one has contracted to pay for the use of borrowed money." *Old Colony R. Co.* v. *Commissioner*, 284 U. S. 552, 560; *Deputy* v. *Dupont*, 308 U. S. 488, 498. We cannot say as a matter of law that the excess interest dividends fall within that category. They appear to be amounts which may be declared or withheld at the pleasure of the board of directors. An obligation to pay may of course arise after the declaration, the same as in case of dividends on stock. But an obligation to pay declared dividends on stock would hardly qualify as "interest" within the meaning of the Act. The analogy of course is not perfect, as these excess interest dividends may not be payable from surplus or earnings of prior years and the obligation to pay the principal amount under each option was absolute. Yet payments made wholly at the discretion of the company have a degree of contingency which the notion of "interest" ordinarily lacks. If we expanded the meaning of the term to include these excess interest dividends, we would indeed relax the strict rule of construction which has obtained in case of deductions under the various Revenue Acts.

The taxpayer argued that the obligation was absolute and binding during the taxable year, that it was reasonable to assume that but for the declaration at the beginning of the year new supplementary contracts would not have been made during the year, that at least in some cases funds already on deposit at the beginning of the year would have been withdrawn, and that even where there was no power of withdrawal the original promise though conditional was one to pay "interest." These arguments were met principally upon the ground of failure of proof:

> While these are interesting questions which are propounded, the facts on which most of them turn were not determined by the Tax Court. Its findings of fact did not go beyond the stipulation. And it apparently was not asked to go farther. It based its ruling on *Penn Mutual Life Ins. Co.* v. *Commissioner, supra*. It may be that custom or a course of dealing or other circumstances would warrant findings of fact which would support at least part of the claimed deduction. But more proof is needed than the provisions of the policies and the contents of the stipulation. It is not our task to draw inferences from facts or to supplement stipulated facts. That function rests with the Tax Court. We may modify or reverse the decision of the Tax Court only if it is "not in accordance with law." 44 Stat. 110, 26 U.S.C. § 1141 (c) (1); *Wilmington Trust Co.* v. *Helvering*, 316, U.S. 164; *Dobson* v. *Commissioner*, 320 U.S. 489. We must make our determination on the record before us. If relevant evidence was offered before the Tax Court but rejected by it, we could remand the case to it for appropriate findings. But no such situation is presented here. Accordingly we can reverse the judgment below only if we can say on the basis of the provisions of policies and the meager stipulation that the excess interest dividends were "interest" within the meaning of the Act as a matter of law.
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> * * *
>
> Appropriate findings of fact might well bring such payments within the meaning of "interest," as for example a finding that their declaration was the basis on which new contractual engagements were made. But such is not this case.

At least a part of the legal issue presented in the case may therefore be considered to be still open.

The case was argued by Mr. John L. Grant for the insurance company, and by Mr. Chester T. Lane for the Commissioner.

Selective Training and Service Act of 1940—Demarcation Between Civil and Military Jurisdictions

Under this Act military jurisdiction over a selectee attaches when he has been "actually inducted" for training and service. "Actually inducted" is construed to be the point at which, after he has been found acceptable by the Army, and in obedience to his board's orders, a selectee undergoes the ceremony or requirements of admission which the War Department has prescribed.

Billings v. *Truesdell, etc.* 88 L. ed. Adv. Ops. 573, 64 Sup. Ct. Rep. 737; U. S. Law Week 4247. (No. 215, argued February 2, decided March 27, 1944).

The question considered in this case is whether Billings is triable under civil jurisdiction or is subject

to trial by a military tribunal under §11 of the Selective Training and Service Act of 1940. It provides that "No person shall be tried by any military or naval court martial in any case arising under this Act unless such person has been actually inducted for the training and service prescribed under this Act or unless he is subject to trial by court martial under laws in force prior to the enactment of this Act."

Billings claimed to be a conscientious objector. He registered at his local board stating that he would never serve in the Army; but he was classified 1-B and later classified as 1-A. The board rejected his claim that he was a conscientious objector and he appealed. The appeal was unsuccessful. Though unwilling to serve in the Army, Billings desired to comply with all the requirements of the Act short of actual induction in order to avoid all civil penalties possible. When ordered by the local board to report at Fort Leavenworth, he joined his group and was taken to Fort Leavenworth. At his physical and mental examinations he made clear to the examining officials his purpose not to serve. He reported to the induction office after being classified in Class 1-B and told the officers that he refused to serve and wanted to turn himself over to the civil authorities. The military officials said that he was already under the jurisdiction of the military and he was placed under guard. He was permitted, however, to telephone an attorney whom he retained to start *habeas corpus* proceedings. Then an Army officer read Billings the oath of induction but he refused to take it. He was advised that refusal made no difference; that "You are in the Army now." He was ordered to submit to finger-printing but refused to obey. Charges were preferred against him for wilful disobedience of that order.

In the *habeas corpus* proceeding a hearing was had and the District Court remanded Billings to Army custody, thus holding that he was subject to military jurisdiction. The Circuit Court of Appeals affirmed, holding that induction was completed when the oath was read to petitioner and he was told that he was inducted into the Army.

On certiorari the judgment was reversed by the Supreme Court in an opinion by Mr. Justice DOUGLAS. Though it was conceded that Billings was not "actually inducted" within the meaning of § 11 of the Act when ordered to report to the induction station, it was contended that from that time on he was subject to at least a limited military jurisdiction under the Articles of War. The opinion examines this contention but concludes that the selectee's status is governed by the Act of 1940, rather than by the Articles of War. The Court's conclusion on this question of construction is stated as follows in the opinion:

> As we pointed out in *Falbo* v. *United States*, 320 U. S. 549, 552, the mobilization program established by the Selective Service System is designed to operate "as one continuous process for the selection of men for national service"—a process in which the civil and military agencies perform integrated functions. The examination of men at induction centers and their acceptance or rejection are parts of that process. Induction marks its end. But prior to that time a selectee is still subject to the Act and not yet a soldier. A case involving his rights or duties as a selectee prior to that event is a case arising under the Act. The civil authorities not the military are charged with the duties of enforcement at that stage of the process. That necessarily means that the measure of a selectee's rights and duties is to be found in the Act not in the Articles of War. For § 16 (a) of the Act suspends all laws or parts thereof which are in conflict with its provisions.

A further contention was made that Billings became a soldier when the Army accepted him after his examinations were completed. This argument, based largely on the War Department Regulations, was also examined but was rejected by the Court.

Finally discussed is the contention, which the Circuit Court of Appeals sustained, that Billings was inducted when the oath was read to him and he was told that he was in the Army. It is noted that at that time Billings had been placed under guard and he was restrained against his will. Though the opinion states that there is no doubt of the power of Congress to subject to military jurisdiction both the willing and the unwilling, it is concluded, as a matter of construction, that Congress did not choose that course in the present emergency. In elaboration of this view the opinion continues:

> It [Congress] imposed a separate penalty on those who defied the law—prosecution by the civil authorities and a maximum penalty of five years' imprisonment or a $10,000 fine or both. § 11. We say that that penalty was aimed at those who defied the law, though in the words of § 11 it includes, of course, only those who have not been "actually inducted." But we give "inducted" the meaning it has in the Act and in the regulations. As we have pointed out, an inducted man is defined by the Selective Service Regulations as one "who has become a member of the land or naval forces through the operation of the Selective Service System." § 601.7. That suggests that he becomes "actually inducted" within the meaning of the Act by submitting to the Selective Service System. The fact that he is not a volunteer is, of course, irrelevant as the Act was designed as a "fair and just system of selective compulsory military training and service." § 1 (b). But induction under the Act and the present regulations is the end product of submission to the selective process and compliance with the orders of the local board.
>
> It must be remembered that § 11 imposes on a selectee a criminal penalty for any failure "to perform any duty required of him under or in the execution" of the Act "or rules or regulations made pursuant thereto." He who reports to the induction station but refuses to be inducted violates § 11 of the Act as clearly as one who refuses to report at all. *United States* v. *Collura, supra*. The order of the local board to report for induction includes a command to submit to induction. Though that command was formerly implied, it is now express. The Selective Service Regulations state that it is the "duty" of a registrant who receives from his local board an order to report for induction "to appear at the place where his induction will be accomplished," "to obey the orders of the representatives of the armed forces while at the place where his induction will be accomplished," and "to submit to induction." § 633.21 (b). Thus it is clear that a refusal to submit to

induction is a violation of the Act rather than a military order. The offense is complete before induction and while the selectee retains his civilian status. That circumstance throws light on the meaning of the words "actually inducted" as used in § 11 of the Act. Congress by accepting the Bone Amendment to § 11 specified the maximum penalty to be imposed on those who violated the Act or disobeyed an order of their board prior to their induction. It also withheld from military courts jurisdiction over those offenders. At the same time Congress did not authorize the Army to search out delinquents wherever they might be and induct them without more. We must therefore assume that Congress as a matter of policy decided that those who disobeyed the order of their board and refused to be inducted were to be punished by the civil authorities and by them alone. If forcible seizure or detention of such offenders by the Army were sanctioned, the Congressional policy of providing the maximum punishment for their delinquency would be undermined.

Moreover, it should be remembered that he who reports at the induction station is following the procedure outlined in the *Falbo* case for the exhaustion of his administrative remedies. Unless he follows that procedure he may not challenge the legality of his classification in the courts. But we can hardly say that he must report to the military in order to exhaust his administrative remedies and then say that if he does so report he may be forcibly inducted against his will. That would indeed make a trap of the *Falbo* case by subjecting those who reported for completion of the Selective Service process to more severe penalties than those who stayed away in defiance of the board's order to report.

These considerations together indicate to us that a selectee becomes "actually inducted" within the meaning of § 11 of the Act when in obedience to the order of his board and after the Army has found him acceptable for service he undergoes whatever ceremony or requirements of admission the War Department has prescribed.

Mr. Justice ROBERTS was for affirmance of the judgment for the reasons stated in the opinion of the Circuit Court of Appeals, 135 F. 2d 505.

Mr. Justice FRANKFURTER delivered a brief opinion observing that Congress has left to judicial construction the question as to when the civil status ceases and military status begins. He adds:

> In the *Falbo* case we held the other day that "The connected series of steps into the national service which begins with registration with the local board does not end until the registrant is accepted by the army . . . ." 320 U. S. 549, 553. The line that was thus drawn—when "the connected series of steps" has ended—seems to me to be the line to draw between the civil and military status of a registrant. In other words, when acceptance of a registrant is communicated by the Army, the Army has made its choice. The man is then in the Army. Such was the ruling, and I believe the correct ruling, of the court below. 135 F. 2d 505. According to the Court's opinion, as I understand it, the Act itself does not draw this line but Congress has authorized such a line to be drawn by appropriate regulations. On that assumption, I do not dissent.

The case was argued by Mr. Edward G. Jennings for the Army and submitted by Mr. Lee Bond for Billings.

Freedom of Worship—Another Jehovah's Witness Case

A municipal ordinance forbidding the sale of books and pamphlets without obtaining a license and paying a license fee is unenforcible against one who sells religious books and tracts, even though he does so as a business and obtains his sole income and living expenses thereby.

Follett v. *Town of McCormick, S. C.*, 88 L. ed. Adv. Ops. 588; 64 Sup. Ct. Rep. 717; U. S. Law Week 4254. (No. 486, argued February 11, decided March 27, 1944).

One Follett, a member of Jehovah's Witnesses, was convicted of violating an ordinance of the town of McCormick, South Carolina, which provided, among other things, that licenses should be exacted and paid by persons selling books in that town at the rate of $1.00 per day and $15.00 per year. Follett was certified by the Watch Tower Bible & Tract Society as "an ordained minister of Jehovah God to preach the gospel of God's kingdom under Christ Jesus." He was a resident of McCormick, where he went from house to house distributing books and had no other source of income than that he received from the money thus collected. He claimed that he merely offered the books for a "contribution" but there was evidence that he "offered to and did sell the books." He had no license and refused to obtain one. At the close of the evidence, he moved for a directed verdict of not guilty claiming that the ordinance restricted freedom of worship in violation of the First Amendment which the Fourteenth Amendment makes applicable to the states. The motion was overruled and appellant found guilty by a jury in the Mayor's Court. The judgment was affirmed by the Circuit Court of General Sessions for McCormick County and by the Supreme Court of South Carolina. The case came up on appeal and the judgment was reversed.

The opinion of the Court was delivered by Mr. Justice DOUGLAS. It is said that the ordinance in this case is in all material respects the same as that involved in *Jones* v. *Opelika* and *Murdock* v. *Pennsylvania*. Mr. Justice DOUGLAS says:

> The Supreme Court of South Carolina recognized those principles but distinguished the present case from the *Murdock* and *Opelika* decisions. It pointed out that the appellant was not an itinerant but was a resident of the town where the canvassing took place, and that the principle of the *Murdock* decision was applicable only to itinerant preachers. It stated, moreover, that appellant earned his living "by the sale of books," that his "occupation was that of selling books and not that of colporteur," that "the sales proven were more commercial than religious." It concluded that the "license was required for the selling of books, not for the spreading of religion."

The opinion declares that it had been pointed out in the *Murdock* case that the distinction between "religious" activity and "purely commercial" activity would at times be vital in determining the constitutionality of license taxes, but it is said that the Court need not determine here "by what tests the existence

of a 'religion' or the 'free exercise' thereof in the constitutional sense may be ascertained or measured," because the Supreme Court of South Carolina had conceded that the book in question is a religious book and that its publication and distribution comes within the words "exercise of religion" as used in the Constitution. It is accordingly declared that appellant's assertion that he was preaching the gospel by going from house to house presenting the gospel of the kingdom in printed form must be accepted and that the matter stands in different form from that of a merchant who sells books on a stand or on the road.

On this point Mr. Justice DOUGLAS says:

> The question is therefore a narrow one. It is whether a flat license tax as applied to one who earns his livelihood as an evangelist or preacher in his home town is constitutional.
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> * * *
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> But if this license tax would be invalid as applied to one who preaches the Gospel from the pulpit, the judgment below must be reversed. For we fail to see how such a tax loses its constitutional infirmity when exacted from those who confine themselves to their own village or town and spread their religious beliefs from door to door or on the street.
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> * * *
>
> This does not mean that religious undertakings must be subsidized. The exemption from a license tax of a preacher who preaches or a parishoner who listens does not mean that either is free from all financial burdens of government, including taxes on income or property. We said as much in the *Murdock* case. 319 U. S. p. 112. But to say that they like other citizens may be subject to general taxation does not mean that they can be required to pay a tax for the exercise of that which the First Amendment has made a high constitutional privilege.

A separate opinion of Mr. Justice ROBERTS, Mr. Justice FRANKFURTER and Mr. Justice JACKSON was filed, in which it is said that the "present decision extends the rule announced in *Jones* v. *Opelika* and *Murdock* v. *Pennsylvania*," that "the ordinance in question does not employ the words of the First Amendment, a law 'prohibiting the free exercise' of religion," that the ordinance is not discriminatory, that it lays a tax on the pursuit of occupations by which persons earn their living in the town of McCormick, that it does not single out persons pursuing any given occupation and exempt others, that it lays no onerous burden on the occupation of appellant, Follet, and is clearly distinguishable from that involved in *Grosjean* v. *American Press Co.* After quoting from the case above referred to, the opinion says:

> We cannot ignore what this decision involves. If the First Amendment grants immunity from taxation to the exercise of religion it must equally grant a similar exemption to those who speak and to the press. It will not do to say that the Amendment, in the clause relating to religion, is couched in the imperative and, in the clause relating to freedom of speech and of press, is couched in the comparative. The Amendment's prohibitions are equally sweeping. If exactions on business or occupation of selling cannot be enforced against Jehovah's Witnesses they can no more be enforced against publishers or vendors of books, whether dealings with religion or other matters of information.
>
> * * *
>
> Not only must the court, if it is to be consistent, accord to dissemination of all opinion, religious or other, the same immunity, but, even in the field of religion alone, the implications of the present decision are startling. Multiple activities by which citizens earn their bread may, with equal propriety, be denominated an exercise of religion as may preaching or selling religious tracts. Certainly this court cannot say that one activity is the exercise of religion and the other is not. The materials for judicial distinction do not exist. It would be difficult to deny the claims of those who devote their lives to the healing of the sick, to the nursing of the disabled, to the betterment of social and economic conditions, and to a myriad other worthy objects, that their respective callings, albeit they earn their living by pursuing them, are, for them, the exercise of religion. Such a belief, however earnestly and honestly held, does not entitle the believers to be free of contribution to the cost of government, which itself guarantees them the privilege of pursuing their callings without governmental prohibition or interference.

Mr. Justice REED filed a concurring opinion, in which he declared that his views on the constitutionality of ordinances of the type under consideration were set out at length in the *Opelika* case and that those views remain unchanged and are not in accord with those announced in this case by the Court. His opinion closes as follows:

> As I see no difference in respect to the exercise of religion between an itinerant distributor and one who remains in one general neighborhood or between one who is active part time and another who is active all of his time, there is no occasion for me to state again views already rejected by a majority of the Court. Consequently, I concur in the conclusion reached in the present case.

Mr. Justice MURPHY also concurred in the prevailing opinion.

The case was argued by Mr. Hayden C. Covington for Follett and by Mr. J. Fred Buzhardt and Mr. Jeff D Griffith for the town of McCormick.

SUMMARIES

Interstate Commerce Act—Charges for Railroad Service in Industrial Plants—Power of Interstate Commerce Commission

The United States of America and Interstate Commerce Commission v. *Wabash Railroad Company et al.*, 88 L. ed. Adv. Ops. 582, 64 Sup. Ct. Rep. 752; U. S. Law Week 4259. (No. 453, argued March 8, decided March 27, 1944.)

Appeal from a judgment of a federal district court of

three judges setting aside an order of the Interstate Commerce Commission.

The Commission instituted a proceeding known as *Ex Parte 104* to investigate practices rendered by interstate carriers at industrial plants and terminals. It concluded that the carrier service should end at the point where the carrier is prevented from performing at its ordinary operating convenience any further service, by the nature, desires or disabilities of the plant. However, it then made no order dealing with particular carriers but later, after supplemental investigation, ordered the suspension of tariff supplements whereby the carrier proposed to eliminate charges for spotting freight cars at the doors of factories in the industrial plant in the instant case. The Commission based its order upon a finding that the performance of spotting service without charge would be an unlawful preference, because a departure from filed tariffs, in violation of §6 (7) of the Interstate Commerce Act. The District Court, however, accepted the railroad's contention that the order cannot be supported merely by the circumstances existing at the plant in question, but must turn upon a comparison of conditions existing there with conditions at competing plants. It held further that, as it appeared that similar service is rendered to many other plants, the Commission's order would compel discrimination against the manufacturer here, contrary to §§ 2 and 3 (1).

The Supreme Court reversed the judgment in an opinion by the CHIEF JUSTICE. The opinion emphasizes that the issue involved is not whether there had been a preference or discrimination under §§ 2 and 3 (1), but simply a violation of § 6 (7). Violation of the latter having been established, it is deemed irrelevant that like violations in other situations, due to practical considerations, must still await remedial action by the Commission.

The case was argued by Mr. Allen Crenshaw for the United States and by Mr. Elmer A. Smith for the Railroad and by Mr. John S. Burchmore for Staley Manufacturing Co.

Longshoremen's & Harbor Workers' Compensation Act —Inapplicable to Master or Member of a Crew or a Vessel

Norton v. *Warner Company*, 88 L. ed. Adv. Ops. 606; 64 Sup. Ct. Rep. 747; U. S. Law Week 4252. (No. 362, argued February 28 and 29, decided March 27, 1944).

Certiorari to review a decision from the Third Circuit Court of Appeals involving the question whether a bargeman is entitled to compensation under the Longshoremen's and Harbor Workers' Compensation Act for injuries received when a capstan bar pulled out and struck him on the chest and caused him to fall. The decision turns on whether the employee was a "master or member of a crew of any vessel." If so, he is not entitled to compensation because of the exclusion of persons so defined from coverage of the Act by § 2 (3) and § 3 (a) (1).

The Deputy Commissioner held the employee to be a harbor worker and not a "master or member of a crew" and awarded compensation. The District Court sustained the award but the Circuit Court of Appeals reversed. On certiorari the Supreme Court affirmed the decision of the Circuit Court in an opinion by Mr. Justice DOUGLAS. The employee was engaged as a boatman on a barge afloat on navigable waters. The barge had no motive power and was moved either by towing or by winding up of a cable with a capstan operated by hand. The barge was a documented vessel which never went to sea, but was confined to waters within a radius of thirty miles of Philadephia. At the time of the injury the employee was the sole person aboard or employed on the barge. He had no duties as to handling cargo and no shore duties. Upon these and other detailed facts as to his status, the Court concludes that the employee is not a harbor worker but a member of a crew or vessel. In reaching this conclusion the Court gives full recognition to the established rule that the findings of the Commissioner are generally conclusive. Where an error of law is committed, however, the courts will not allow the Commissioner's ruling to stand. Upon the record the Court differentiates this case from *South Chicago Coal & Dock Co.* v. *Bassett*, 309 U. S. 251, and concludes that only by a distorted definition of the word "crew" as used in the Act could the employee be restricted to the remedy afforded by it and excluded from recovery under the Jones Act or be barred from relief in admiralty.

Mr. Justice ROBERTS concurred in the result.

The case was argued by Mr. Assistant Attorney General Shea for Norton and by Mr. Samuel B. Fortenbaugh, Jr., for Warner Company, and by Mr. Abraham E. Freedman for National Marine Engineers Beneficial Association, as amicus curiae.

Taxation—Stamp Tax—Securities and Real Property Transferred on Bank Consolidation

U. S. v. *Seattle-First National Bank*, 88 L. ed. Adv. Ops. 593; 64 Sup. Ct. Rep. 713; U. S. Law Week 4236. (No. 267, argued February 7 and 8, 1944, decided March 27, 1944).

In 1935 the directors of Spokane and Eastern Trust Company, a state bank, entered into an agreement with the directors of First National Bank of Seattle providing for the consolidation of the two banks under the charter of the latter and under the corporate title of Seattle-First National Bank. The consolidation agreement was approved by the stockholders of both banks and by the Comptroller of the Currency in compliance with the provisions of Section 3 of the National Banking Act (12 U. S. C. Sec. 34a). The state bank owned securities and real property which were part of its corporate assets and also held securities in trust, the legal title to which

was vested in it as trustee, executor, guardian and in various other fiduciary capacities. All of these holdings passed to the Seattle-First National Bank by virtue of the consolidation and without the execution of any deed or assignment. Documentary stamp taxes were purchased and affixed at the instance of a deputy collector who insisted that the consolidation had resulted in taxable transfers of the securities and real property. A suit for refund of the amount of stamps so affixed was brought and the District Court and the Circuit Court of Appeals held that the transfers of the securities were exempt from tax by reason of the provisions in the then existing stamp tax regulations exempting those tranfers which take place "wholly by operation of law" and that no tax was payable with respect to the real estate since there was no deed, transfer or conveyance executed.

The Supreme Court, in an opinion written by Mr. Justice MURPHY, affirms the Circuit Court decision and holds that the provision of the regulations referred to above is effective to exempt the transfers of all of the securities from tax even though certain voluntary acts of the directors and stockholders were requisite to carry out the consolidation under the National Banking Act. Mr. Justice MURPHY, referring to the provisions of Section 3 of the National Banking Act, including the provision that upon such a consolidation all rights and interests of each bank in every species of property "shall be deemed to be transferred to and vested in" the consolidated national banking association without any deed or other transfer, determines that the transfers "occurred solely and automatically by virtue of Section 3 of the National Banking Act" which was the mechanism by which the transfer of securities was made effective. As to the tax exacted on the transfer of the real property owned by the state bank, Mr. Justice MURPHY holds that since the realty was not conveyed to or vested in the consolidated association by means of any deed, instrument or writing and since the realty cannot be said to have been "sold" or vested in a "purchaser or purchasers" within the ordinary meaning of those terms, no stamp tax thereon was payable.

The case was argued by Mr. Arnold L. Graves for Seattle-First National Bank and by Mr. Valentine Brookes for the United States.

Practice—Appeals—Disposition of Case Where Material Changes Occur Pending Appeal

L. Metcalfe Walling, Administrator, etc., v. *Reuter, Inc.*, 88 L. ed. Adv. Ops. 761; 64 Sup. Ct. Rep. 826; U. S. Law Week 4306. (No. 436, argued March 10, decided April 10, 1944.)

A Wage and Hour Administrator of the Department of Labor brought suit under § 17 of the Fair Labor Standards Act and the District Court gave judgment against the employer, a family corporation organized in Louisiana, restraining it and its servants, agents, employees, attorneys and all others acting or claiming to act in its behalf from violations found by the District Court. The Circuit Court of Appeals reversed but the Supreme Court thereafter granted certiorari. While the writ was pending the corporation was dissolved and a motion was made to recall the writ of certiorari on the ground that the case has become moot; and further that, for want of a party respondent, the Supreme Court is powerless to render effective judgment in the appellate proceeding now pending before it. The dissolution of the corporate employer was stated to have been to secure tax advantages.

The CHIEF JUSTICE delivered the opinion of the Supreme Court. He points out that the moving papers failed to establish that the case has become moot. Since the Administrator is entitled to retain whatever benefits he had under the judgment (subject to full appellate review) and since appellate review had been partially defeated by the dissolution of the family corporation, the Supreme Court vacated the judgment of the Court of Appeals and remanded the cause to the District Court to enable the Administrator to take such proceedings there for enforcement of the judgment as may be proper, but subject to the right appropriate appellate review.

The case was argued by Mr. Douglas Maggs for the Government and by Mr. Frank S. Normann for Reuter.

Interstate Commerce Act—Scope of Act in Relation to Interstate Carriers by Water

Cornell Steamboat Company v. *United States, et al.*, 88 L. ed. Adv. Ops. 712; 64 Sup. Ct. Rep. 768; U. S. Law Week 4284. (No. 384, argued March 1 and 2, decided April 3, 1944.)

Cornell operates tugboats for hire on the Hudson River and in New York harbor, carrying no cargo, but towing cargo-laden vessels. The towing service is offered to the general public and about 95% of the vessels towed move from points in New York to other points in that state, but there movements generally cross the boundary line between New York and New Jersey. Part III of the Interstate Commerce Act subjects to federal regulation contract or common carriers by water in interstate commerce. The Interstate Commerce Commission by appropriate proceedings held that Cornell's business was covered.

A District Court of three judges sustained the Commission's order, and on direct appeal the ruling was affirmed by the Supreme Court in an opinion by Mr. Justice BLACK. Upon an examination of the provisions of Part III, §§ 302 (c) (d) (f) (g) and (h), the Court holds: (1) that Cornell is subject to the Act; (2) that Cornell was properly held to be a common, rather than a contract carrier; and (3) that transportation by water across a state boundary line, though originating and terminating in a single state, is subject to the Act.

Mr. Justice FRANKFURTER delivered a separate opinion dissenting as to the construction of the statute to the extent that it is held to cover operations from one place to another in New York, notwithstanding the crossing

of the New York-New Jersey boundary line.

Mr. Justice ROBERTS concurred with Mr. Justice FRANKFURTER.

Boston Tow Boat Company v. *United States, et al.*, 88 L. ed. Adv. Ops. 720; 64 Sup. Ct. Rep. 776; U. S. Law Week 4287. (No. 385, argued March 1 and 2, decided April 3, 1944.)

In this case, Boston Tow Boat Company had intervened in the Cornell proceedings before the Commission, reviewed by the Supreme Court in No. 384. Boston Company, operating tug boats in the harbor of Boston, Massachusetts, contended that it was aggrieved by the Commission's order against Cornell, and it was allowed to intervene in the District Court in that case.

On appeal, the Supreme Court, in an opinion by Mr. Justice BLACK, holds that Boston Tow Boat has no interest in the Cornell litigation sufficient to take a separate appeal to the Supreme Court.

The cases were argued by Mr. Robert S. Erskine for Cornell Company and by Mr. Charles S. Bolster for the Boston Towboat Company and by Mr. Robert L. Pierce for the Government, and by Mr. Christopher Heckman for the National Water Carriers Association, Inc.

Interstate Commerce Act—Certificate Authorizing Motor Carriers to Operate—Power of Interstate Commerce Commission to Impose Conditions

Chicago, Saint Paul, Minneapolis & Omaha Railway Company v. *United States, et al.*, 88 L. ed. Adv. Ops. 771; 64 Sup. Ct. Rep. 842; U. S. Law Week 4291. (No. 182, argued March 8, decided April 10, 1944).

Appellants, five railroads operating in Minnesota and North Dakota, brought suit in a three-judge federal court to set aside an order of the Interstate Commerce Commission granting operating authority to a motor carrier of goods in their territory. The application covered routes as to which "grandfather rights" were asserted under Section 206 (a) of Part II of the Interstate Commerce Act and other routes as to which authority was sought under Sections 206 (a) and 207 (a) of the Act, being based upon present or future public convenience and necessity. The Commission granted rights as to both and the District Court sustained the Commission's order and dismissed the complaint on the merits. On direct appeal the Supreme Court affirmed in an opinion by Mr. Justice JACKSON.

The opinion briefly disposes of the contention that the findings were not supported by evidence, and the conclusion is reached that the District Court rightly declined to substitute its judgment for the Commission's judgment on the testimony.

The question of law raised was whether the Commission, on its finding need for service, had power to authorize service to intermediate points not asked for by the applicant. The applicant accepted the grant but the competing railroads complained against it, basing their contention on the fact that the applicant had amended his application by withdrawing request for authority as to all service in interstate commerce between points in Minnesota. It was claimed that this action withdrew the intermediate points from issue and threw the contesting parties off guard so that they had an inadequate opportunity to be heard on the matters ultimately decided. On the record, the Court refuses to sustain this contention. It is emphasized that the Commission had power on the facts to include authority for greater service than had been requested and emphasis is placed upon the fact that in issuing any certificate of the character in question the Commission is vested with power to attach reasonable terms, conditions, and limitations to the exercise of the privileges granted including terms, conditions, and limitations as to the extension of the route or routes of the carrier.

The case was argued by Mr. Amos M. Mathews for the Railroad, by Mr. Nelson Thomas for the U. S., by Mr. Perry R. Moore for Cornelius W. Styer, and by Mr. Fred W. Putnam for Glendenning Motorways, Inc.

Government Contracts—Action for Damages Resulting from Right of Government to Prevent Delays

United States v. *Blair*, 88 L. ed. Adv. Ops. 765; 64 Sup. Ct. Rep. 820; U. S. Law Week 4297. (No. 75, argued February 1, decided April 10, 1944).

This is an action brought against the government by a contractor to recover damages claimed to have been suffered in consequence of the failure of the government to compel another contract or to perform other work on the same building, which had to be performed prior to the performance of the contract on suit. The action was brought against the government because of the failure to compel performance of or terminate the other contract or prevent its performance by others.

The Court of Claims gave judgment against the government for $130,911.98 Certiorari was granted and the Supreme Court refused the judgment as to all thereof except a single item, $9,790.27, that being the amount due by the original contractor for marble and soapstone furnished him for the work.

The opinion of the Court was delivered by Mr. Justice MURPHY. He thought that since there was on the contract no express undertaking by the government to prevent prejudicial delay by other contractors, there could be no recovery for damages resulting from delay which prevented completion within the expected or the contracted period.

Mr. Justice FRANKFURTER dissented in part. He says:

> A Government contract should be interpreted as are contracts between individuals, with a view to ascertaining the intention of the parties and to give it effect accordingly, if that can be done consistently with the terms of the instrument.

Mr. Justice ROBERTS joined in this dissent.

The case was argued by Mr. Assistant Attorney General Shea for the United States and by Mr. H. Cecil Kilpatrick and Mr. Richard S. Doyle for Algernon Blair.

BOOK REVIEWS

FEDERATION, the Coming Structure of World Government, Cortez A. M. Ewing and others; including Essays by Wendell L. Willke, Henry A Wallace, T. V. Soong, and an Appendix; *Proposed Constitution of the United Nations*. Norman, Oklahoma, University of Oklahoma Press. 1944. Pp. xii, 234—This compact volume is a symposium or rather a series of related essays assembled in support of the theme that the basis of future international relationships will be, and indeed should be, contained within a formula of world federation. As such this book takes its place with the longer and well known volumes by W. Ivor Jennings, *A Federation for Western Europe* (New York: Macmillan Co., 1940) and by Oscar Newfang, *World Federation* (New York: Barnes and Noble, 1939) and also the recent essay of Arnold Brecht, *European Federation—The Democratic Alternative* (Harvard Law Review, Vol. 55, February, 1942, page 561).

The essays collected by Mr. Ewing are factual and forthright. The broad argument therein presented will be welcomed by the many thoughtful Americans who have come to the conclusion that "The states of the world form a community, and the protection and advancement of the common interests of their people require effective organization of the community of states."[1]

The outstanding feature of this edition of a dozen or more essays is the assurance given that federation is to be the coming structure of world government. This conclusion has been reached by the assertion (page 59) that "World order may be secured in either of two ways. The first is through the establishment of the Pax Romana, the peace of the conqueror. . . . The second method by which a peaceful order may be achieved is that of federatism."

It may indeed be true that Rome achieved a sort of peace for some centuries, tempered by recurrent but distant border warfare; and it is also true that, if the United States, Great Britain and Russia should make a valid, binding and lasting treaty for a world federation, into which other countries are invited to enter by a persuasive voice, reminiscent of the one once used by the elder Roosevelt, who counselled that we should speak softly but carry a big stick, then world federation may bring to an aching world a reasonable assurance of permanent peace.

Professor Brecht does not assume a prophetic role. In scholarly manner, and with obvious understanding of earlier attempts at collaboration between nations, he propounds standards for an "European Federation—The Democratic Alternative." Among the minimum requirements which he suggests are: (pages 564, 565)

> "The coordinating institutions should not, for the time being, assume the nature of a superstate in the sense of a superstructure endowed with universal integrating character;" and "The League of Nations should continue. Its reform should be accomplished separately."

The newly published volume on Federation is a reasoned brief for a definite conclusion. The authors, however, do not in these essays seem to face the possibility of obtaining peace except through one or two routes labelled "Federation" or "Pax Romana." Even if we deem illusory and dangerous the bypaths marked "Balance of Power" or "Freedom from Entangling Alliances," there remains a straight if narrow path described as "Collaboration, The Second Postulate" which explains that "The development of an adequate system of international law depends upon continuous collaboration by states to promote the common welfare of all peoples and to maintain just and peaceful relations among all States."[2]

In the opinion of the writer of this review, students of world organization should consider this last mentioned "Alternative—Collaboration Without Impairment of Sovereignty or the Treaty-Making Power." In brief, this alternative may include a program which may be outlined in half a page:

(a) Creation by consent of the countries concerned, of various regional "United Nations Conferences" each arranged so as to include one representative (and alternate) from each country, colony or dominion in a geographical area within which a common culture or tradition of cooperation has developed, or in which similar problems are faced. Illustrations: Central American republics, South American countries, Baltic nations, Balkan countries, South European countries, African colonies, Near East independent countries, Far Eastern countries and colonies.

(b) Creation of a single "United Nations Commission," consisting of about fifteen Commissioners (and alternates) chosen in two different ways: Four or five named, respectively, by the few leading countries of the world which have been carrying the chief burden of the present war, and ten or a dozen designated respectively by each of the various "regional conferences," (with an alternate in each instance). Tentative composition of the "United Nations Commission" would include one Commissioner from each of the following: The United States, The British Commonwealth (exclusive of the Dominions), The Dominions (as a group), Russia, China, Central American Conference, South American Conference, Baltic Conference, etc.

1. The first "postulate" of "a statement of community of views" of some 200 experts, including Professor Manley O. Hudson, released to the newspapers on March 27, 1944. Quotation is from New York *Times*, page 8, March 27, 1944.

2. New York *Times*, March 17, 1944, page 8.

(c) Creation of a "United Nations Assembly" consisting of one member (and alternate) from each of the generally recognized nations, dominions and important colonies or groups of colonies throughout the world. An inclusive count may disclose a list of about seventy-five distinct countries, colonies or dominions which may be eligible to name a member of the "United Nations Assembly."

(d) Upon the request of any regional conference a definitive recommendation approved by it should be submitted for the consideration of both the Commission and the Assembly. If such proposal in either the original or a modified form, is approved by a majority of the members of the Commission and of the Assembly, then such proposal as finally approved by both bodies should be forthwith transmitted by the Secretariat to the government of each nation adhering to the Compact with the request that formal action be taken in regard thereto by the treaty making (and treaty ratifying) instrumentality of such government.

(e) While carefully respecting the sovereignty of each country and its right to make treaties in the manner of its choice, machinery is created for collaboration at the regional level between the governments of each nation, dominion and important colony as to any international problem. The study of such problems is facilitated, not only within the region but ultimately at the world level. An ordered means is provided for the crystallizations of public opinion and for the peaceful solution of difficult problems.

ALBERT SMITH FAUGHT.

Philadelphia

Jefferson and the Press, by Frank L. Mott. Baton Rouge: Louisiana State University Press, 1943. Pp. 65. $1.00.—This monograph, published under the auspices of the National Council of Research of the American Association of Schools and Departments of Journalism, has as its purpose "to bring together in epitome Jefferson's philosophy of the press and to recount briefly his experiences with the newspapers of his time."

By judicious quotation from Jefferson's correspondence the author has succeeded in accomplishing his purpose. The story of Jefferson's changing attitudes is well compressed, the book carefully annotated.

In a letter to Edward Carrington in 1787, when Jefferson was advocating a constitutional guarantee of freedom of the press as part of the Bill of Rights, he wrote: "The basis of our governments being the opinion of the people, the first object should be to keep that right; and were it left to me to decide whether we should have a government without newspapers, or newspapers without a government, I should not hesitate a moment to prefer the latter."

It seems incredible that the same man in 1807 should have written in answer to young John Norval, seeking advice on the prospect of engaging in journalism, as follows: "It is a melancholy truth that a suppression of the press could not more completely deprive the nation of its benefits, than is done by its abandoned prostitution to falsehood. Nothing can now be believed which is seen in a newspaper. Truth itself becomes suspicious by being put into that polluted vehicle. . . . I will add that the man who never looks into a newspaper is better informed than he who reads them."[1]

Jefferson was acting as a cabinet member under Washington and later promoted and supported Republican journals which aimed their barbs at Washington and John Adams. His attack on the Sedition Act was a deciding factor in his election to the presidency. The real test of his loyalty to the principle of freedom of the press came during his two terms as President. In spite of the vicious attacks made upon him he seems not to have wavered in his belief in the principle of freedom but to have become pretty thoroughly disillusioned with its practice. Except for signed official papers, Jefferson never wrote over his own name for publication in newspapers. After his retirement he subscribed to but a single paper: "I read no newspaper now but Ritchie's and in that chiefly the advertisements."[1]

EDWARD A. DUDDY

Chicago.

Lincoln, Douglas, The Weather as Destiny, by William F. Peterson. 1943. Springfield: Charles C. Thomas Pp. x, 211. $3.—Dr. Peterson has a hobby. He rides it hard and recklessly. He believes that weather affects human beings to a degree great enough to determine their destiny, gives greatness or defeat and even shapes the whole course of history for good or ill. The bodies of men are like frail canoes on quiet or troubled seas, and against them beat the forces of heat and cold, wetness and dryness, wind and calm, demanding a constant adjustment of heart and nerves and bloodvessels that varies in individuals according to the shape and size of their bodies. The tall, gaunt individual knows more of stress and strain than the short, compact individual, and reacts more quickly and more radically to sudden shifts of weather. Thus final temperament and character are thereby fixed and success or failure in life determined.

To support his thesis Dr. Peterson brings a wide knowledge of physiology and a vast amount of research and observation. That his medical work is sound few would deny, and that there is some relation between weather conditions and human reactions no one would question. The trouble begins when application is made to historical figures and events, and broad, sweeping conclusions are drawn. And that is just where Dr. Peterson insists on beginning and what he ends by doing. He selects Abraham Lincoln as an illustration of the thin type and Stephen A. Douglas as an illustra-

1. To Nathaniel Mason, January 12, 1819.

tion of the compact type. He selects events in their lives, studies the weather conditions at the time and draws the dubious conclusion that weather determined the reactions of each man to each event. For instance, he finds that there was a sharp change in temperature at the time of Ann Rutledge's death and concludes that Lincoln's extreme reactions were due to that fact. He also finds that the weather changes were extreme at the time Lincoln broke his engagement to Mary Todd and concludes that weather was responsible. He goes even further and suggests, at least, that fate somehow constructed Douglas as he was, and Lincoln as he was, so that the one might provide a proper foil for the other and the nation might thereby benefit.

By such extreme claims the value in Dr. Peterson's work is largely destroyed. There are too many complex forces at work in any given event and too many factors involved in an individual's reactions to events to be reduced to the simple matter of weather. Simply because Lincoln was depressed or not feeling well on some occasion when the weather changed is not proof that the two facts are related as sole cause and result. He may also have eaten something which did not agree with him or a half dozen or more other factors may have disturbed him at the time. Because weather conditions may often be one factor, or even a final factor, in producing a given reaction it is hardly sound method to ascribe the whole to that factor alone. Certainly the few cases of weather shifts and corresponding reactions cited by Dr. Peterson do not warrant such generalization as he makes from them. He probably has good reason for a modest claim regarding the importance of weather in shaping human conduct but by over-stresing his conclusions he damages even that modest claim.

Chicago — AVERY CRAVEN

Recent Publications

AMERICAN DIPLOMACY IN ACTION, by Richard W. Van Alstyne. 1944. Stanford University Press; London; Humphrey Milford, Oxford University Press. Pp. XVI, 750. $5.00.

MCKELVEY ON EVIDENCE, by John Jay McKelvey. Hornbook Series. 1944. St. Paul: West Publishing Company. Pp. XXIV, 814. $5.00.

MUNICIPALITIES AND THE LAW IN ACTION, edited by Charles S. Rhyne. 1944. Washington, D. C.: National Institute of Municipal Law Offices. Pp. 553. $10.00.

CANADIAN LAW OF COPYRIGHT, by Harold G. Fox. 1944. Toronto, Canada: The University of Toronto Press. Pp. LXIV, 770. $18.50.

YOUNG OFFENDERS, by A. M. Carr-Saunders, Hermann Mannheim, and E. C. Rhodes. 1944. New York: The MacMillan Company. Pp. X, 168. $1.75.

THE CONSTITUTION AND WORLD ORGANIZATION, by Edward S. Corwin, 1944. Princeton, N. J.: Princeton University Press. Pp. XIII, 64. $1.00.

VOICES FROM UNOCCUPIED CHINA, edited by Harley F. MacNair. 1944. Chicago, Ill.: The University of Chicago Press. Pp. LV, 107. $1.50.

WARTIME LABOR RELATIONS, by John H. Mariano. 1944. New York: National Public & Labor Relations Service Bureau, Inc. Pp. VII, 216. $2.75.

PUBLIC AND PRIVATE GOVERNMENT, by Charles Edward Merriam. 1944. New Haven: Yale University Press. London: Humphrey Milford, Oxford University Press. Pp. 78. $1.75.

ARGENTINE CONSTITUTIONAL LAW, by Santos P. Amadeo. 1943. New York: Columbia University Press. Pp. X, 243.

THE AMERICAN WAY: Selections from the Public Addresses and Papers of Franklin D. Roosevelt, edited by Dagobert D. Runes. 1944. New York: Philosophical Library. Pp. 71. $1.50.

EDITORIALS

Post-War Cooperation of the Nations for Peace and Law

(Continued from page 281)

views of members of the Association on the vital subjects entrusted to its jurisdiction.

The Law Reviews and the Lawyers

THIS issue contains for the second time our experimental feature, "The Practising Lawyer's Guide to the Current Law Magazines." A much broader coverage signalizes the new department, but there remain many periodicals and a great quantity of useful material which could not as yet be included, within our limited space.

The selection and preparation of the material for this department have as a by-product a heartening realization of the perhaps surprising extent to which, despite all wartime obstacles, the diminished faculties of law and the reduced student staffs, in virtually every state, have kept untiringly at the tasks of developing and publishing articles of manifest utility to the practising lawyers of the whole country.

To these men of the law schools, we say that any attestation here of their diligence and zeal, their unflagging scholarship, and their devotion to the service of the profession of law, is less than commensurate tribute to the worth of what they are continuing to do. All that is taking place is most encouraging as to what our law teachers will be inspirited to do when our young men come home from the wars.

We planned and instituted this new department primarily in the belief that it will be more and more of use to the average practitioner. We are gratified to find that it also gives the means of revealing to the profession the quality and spirit of what is still going on in the law schools throughout the land.

NOTICE OF ELECTION OF STATE DELEGATES IN 1944

THE Board of Elections announces that, in accordance with Article V, Section 5, of the Constitution, the following nominations have been made by petition for the office of State Delegate to be elected in 1944 for a regular three-year term beginning at the adjournment of the 1944 Annual Meeting, and for vacancies as indicated:

Jurisdiction	Nominees		Petition Published
Alabama	William Logan Martin	Birmingham	March
California	Delger Trowbridge	San Francisco	April
	Loyd Wright	Los Angeles	April
*Delaware	P. Warren Green	Wilmington	February
Florida	Cody Fowler	Tampa	March
Hawaii	No petition filed		
**Kansas	Douglas Hudson	Fort Scott	April
**Kentucky	No petition filed		
Massachusetts	Frank W. Grinnell	Boston	April
Missouri	John T. Barker	Kansas City	February
†Montana	Julius J. Wuerthner	Great Falls	April
New Mexico	Herbert B. Gerhart	Santa Fe	April
North Carolina	Francis E. Winslow	Rocky Mount	April
North Dakota	Herbert G. Nilles	Fargo	April
Pennsylvania	Bernard J. Myers	Lancaster	March
†South Carolina	Douglas McKay	Columbia	May
Tennessee	John T. Shea	Memphis	April
†Texas	James L. Shepherd, Jr.	Houston	April
Vermont	Deane C. Davis	Barre	April
Virginia	Thomas B. Gay	Richmond	April
Wisconsin	Albert B. Houghton	Milwaukee	April
Territorial Group (Alaska, Canal Zone and Philippine Islands)	No petition filed		

* For vacancy in term expiring at adjournment of 1946 Annual Meeting.
** For regular term and for vacancy in term expiring at adjournment of 1944 Annual Meeting.
† For vacancy in term expiring at adjournment of 1945 Annual Meeting.

Ballots will be mailed on May 5 to all Association members in good standing in the above jurisdictions. In order to be counted, all ballots must be received by the Board of Elections at the Headquarters of the American Bar Association before the close of business at 5:00 P. M. on Friday, June 2, 1944, except in the case of Hawaii and the Territorial Group from which they must be returned by June 30, 1944.

It will be observed that there are two nominees for the office in only one state, namely, California, and that Hawaii, Kentucky and the Territorial Group failed to make any nomination. In these and all other jurisdictions a vote may be cast for any member in good standing accredited to the voter's jurisdiction by writing in the name in the blank space provided and placing an X in the square opposite.

Only Members Who Have Paid Their Dues for The Current Year Will Receive Ballots as They are the Only Ones in Good Standing and Therefore Entitled to Vote.

Members in military service, because of a change in address, may not receive a ballot for the jurisdiction to which they are normally accredited. If they fail to receive a ballot, they are requested to write promptly to the Association office in Chicago and one will be forwarded.

A nominating petition not heretofore published appears below.

Board of Elections
Edward T. Fairchild, *Chairman*
William P. MacCracken, Jr.
Laurent K. Varnum

NOMINATING PETITION

SOUTH CAROLINA

To the Board of Elections:

The undersigned hereby nominate Douglas McKay, of Columbia, for the office of State Delegate for and from the State of South Carolina, to be elected in 1944 for a vacancy in the term expiring at the adjournment of the 1945 Annual Meeting:

Messrs. B. Allston Moore, Arthur R. Young, Charles W. Waring, C. L. B. Rivers, Frederick H. Horlbeck, Thomas P. Stoney, George L. Buist, Ben Scott Whaley, Lionel K. Legge, and Harold A. Mouzon, of Charleston;

Messrs. Pinckney L. Cain, S. Augustus Black, F. B. Grier, Jr., E. W. Mullins, R. Beverley Herbert, John E. Edens, J. B. S. Lyles, J. E. Belser, F. Wm. Cappelmann, G. Duncan Bellinger, W. C. McLain, John M. Daniel, Harry D. Reed, D. McK. Winter, Charles B. Elliott, and Christie Benet, of Columbia; and

Messrs. Thomas M. Lyles, Leon Moore, Thos. B. Butler, Jesse W. Boyd, J. Hertz Brown, Samuel R. Watt, C. E. Daniel, C. C. Wyche, Harvey W. Johnson, Miller C. Foster, Benjamin O. Johnson, Ralph W. Mitchell, and L. W. Perrin, of Spartanburg.

LONDON LETTER

THE Office of War Information of the United States Government has issued a cordial invitation to the Libraries of the Inns of Court and the Law Society to use the American Library which has been established as a special war reference library. The invitation modestly states that it is a "utility" or "austerity" library, but that the increasingly valuable collection contains basic printed data explanatory of all phases of American life, and recent data on other subjects published in the United States. It is stated that every effort is being made to secure the rapid transmittal of at least a single copy of a wide range of American periodicals, books and documents. The library is essentially a reference library, and books cannot be lent from it except under very special circumstances. The reading room is located on the ground floor (Room 21) of the American Embassy at 1 Grosvenor Square, and is open from 9 a.m. to 6 p.m. The generous invitation to the legal profession has been greatly appreciated.

Gray's Inn

Plans have been submitted by Mr. Edward Maufe, the well known architect, for the restoration and rebuilding of South Square, Gray's Inn, and they have been placed on view in the library. With them is a book, provided by order of the Masters of the Bench, in which members of the Hall are invited to make comments and suggestions. According to the plan it is proposed to restore the Hall to its former state, incorporating the screen, which fortunately escaped destruction when the rest of the building was burnt. The Benchers apartments and Pension Room will be extended beyond their former boundaries, and will occupy the remaining space on the north side of the Square, previously forming the older part of the Library. The Treasury and other administrative offices of the Inn will be on the ground floor. The Library building, it is intended, will fill the whole of the east side of the Square and will be on the first floor, with store rooms in the basement. The Common Room will be immediately below the Library, on the ground floor. Balconies are shown fronting the Library windows. The entrance to the building will be in the southeast corner of the Square. The south side of the Square recalls in some measure the appearance of the old buildings which have been destroyed, except that the entrances have been provided with semi-circular steps, and two small balconies adorn first floor windows. The old Common Room, to the west of the Hall, which at present houses the temporary Library and Treasury Office, will be restored, and may be used as chambers or class rooms. The statue of Sir Francis Bacon, which was blown from its pedestal, is to be replaced in its former position in the grass plot in the centre of the Square. There is to be a triple archway, with chambers above, leading from South Square to Gray's Inn Lane and Holborn, the center arch being much larger than the side ones, with balconies over each arch.

The idea of providing a book for comments and suggestions is a good one. Not only does it indicate a desire on the part of the Bench to take the Members of the Hall into their confidence in matters of reconstruction, but it has also been the means of obtaining useful, and for the most part, constructive criticism. The balconies shown on the plans, a rather startling innovation, do not seem to be generally popular, but, whatever small variations may be introduced before the scheme is finally adopted, it must be admitted that Mr. Maufe has recaptured the charm of the old Square which so many generations of Members of the Inn have known.

Inner Temple

The Inner Temple has for some time been getting together a collection of reports, statutes, digests, textbooks, etc., which will form a nucleus upon which to build that part of their Library which was destroyed by fire. Such good progress has been made, both by means of purchase and gift, that it was decided to open a temporary Library, which is housed on the ground floor of No. 2 King's Bench Walk, for the use of Members of that Inn. Invitations were issued to the formal opening, which took place on February 17, 1944, at which Lord Simon, the Lord High Chancellor of Great Britain and a Bencher of the Inner Temple, gave an address. The meeting was presided over by Mr. R. M. Montgomery, K. C., Treasurer of the Inn, supported by Mr. C. T. Le Quesne, K. C., the

Master of the Library, and was attended by many notables of the English Bar, among whom may be mentioned Lord Caldecote, Lord Chief Justice; Lord Porter and Lord Wright, Lords of Appeal in Ordinary; Lord Greene, Master of the Rolls; and the Treasurers of the Middle Temple, Lincoln's Inn and Gray's Inn. The Librarians of the other Inns of Court, together with the Librarian of the Bar Library in the Royal Courts of Justice, were also present. The Treasurer, in a few well chosen words, expressed the appreciation of the Masters of the Bench of the honour conferred upon them by the Lord Chancellor in consenting to be present and address them on this occasion.

Lord Simon began his address by stating that the Inner Temple owed a great debt of gratitude to their Master of the Library for the work he had done in connection with the fitting up of the temporary Library, and recalled the many occasions upon which Mr. Le Quesne had been seen delving among the ruins to rescue some of the treasures of the Inn. He also paid tribute to the "gallant effort" made by their Librarian, Mr. E. A. P. Hart, who had succeeded in taking to various places of safety about 45,000 volumes before they were overtaken by the disaster of May 10, 1941. On that day approximately 40,000 books were destroyed by fire, together with the building itself, and the Society's Hall. The Lord Chancellor made mention of the very fine collection of general literature, and rare and classical books possessed by the Inn, many of which had fortunately been saved from destruction. The temporary Library, although at present not very extensive, he thought would go far to meet the needs of practising Members. It contained a good selection of text-books, reports and digests—the latter so called by reason of their being completely indigestible. He looked forward to the time when a new and finer Library would be built to house the Society's books, and was fully persuaded that the gladsome light would radiate again from that seat of learning. He then declared the Library open.

Tea was served in the Niblett Hall after the address, and the temporary premises of the Library were inspected by those present.

Middle Temple

Committees of the Bench of the Middle Temple have met from time to time to consider plans for the restoration of the Inn and the rebuilding of destroyed premises after the war. Their proposals are not sufficiently advanced to warrant a public statement concerning them, but it is believed that it is the intention to preserve, as far as possible the pre-war appearance of the Inn. The interiors of the new buildings which must be erected, however, will probably be on much more modern lines, and provided with lifts, so that the top floors may be used as professional chambers. Hitherto these higher floors have been let to Members of the Inn for residential purposes.

It was officially announced from Buckingham Palace, on the 17th February, 1944, that Her Majesty the Queen had consented to become a Master of the Bench of the Middle Temple. It has been the custom for many years for Members of the Royal Family to be made Benchers of the various Inns of Court, and recently Queen Mary became a Bencher of Lincoln's Inn. It is not expected that any special celebration will mark the occasion of the Queen's call to the Bench, owing to difficulties created by the war, but it is hoped that, when peace returns, opportunities may occur for Her Majesty to take part in the revived activities of the Inn with which she has graciously become associated.

Supreme Court

The Supreme Court of Judicature (Amendment) Bill, which was introduced in the House of Commons on January 20th, 1944, sets out to put into effect those recommendations proposed by the Committee, presided over by Sir Ralph Wedgwood, which recently reported to the Lord Chancellor on the subject of the trial of divorce actions outside London, to which reference was made in a former London Letter. It may be remembered that the suggestion made by that Committe was, *inter alia*, that more judges should be appointed, and this Bill is being passed with that object in view. As the law now stands the maximum number of puisne judges of the High Court is twenty-nine. (At the present moment there are only twenty-six). By puisne judges is meant the High Court Judges, excluding the Lord Chief Justice, the President of the Probate, Divorce and Admiralty Division, and, of course, the Lords Justices of Appeal. On the occurrence of a vacancy among those Judges who are attached to the King's Bench Division, the vacancy cannot, unless the number falls below seventeen, be filled without an address from both Houses of Parliament, representing that the state of business in that Division requires it to be filled. On the occurrence of a vacancy in the Probate, Divorce and Admiralty Division, the vacancy cannot be filled without an address from both Houses unless the number of puisne judges in that Division is less than three. In the Chancery Division a vacancy cannot be filled if the number of puisne judges is five, unless the Lord Chancellor, with the concurrence of the Treasury, is satisfied that the state of business in that Division requires that it should be filled. The effect of these provisions is that when a vacancy occurs the state of business in each Division must be considered separately.

WAR NOTES

By TAPPAN GREGORY
of the Chicago Bar

THERE is reported (C.C.N.S.) a decision of Common Pleas Judge H. E. Culbertson of Ohio, holding that service of summons in a divorce suit at the home of the parents of a soldier where he had lived after separating from his wife, constituted "leaving a copy at his usual place of residence" within the requirements of the statute. The soldier was a resident of Ohio when he left his parents' home to join the army. The court held that the statute did not place soldiers in any different category from other persons and recognized that he did not lose his legal residence in Ohio by joining the army. This decision seems to be contrary to a recent decision by Judge Hunsicker of Akron.

In the case before Judge Hunsicker the soldier had been served by the sheriff in California and as a matter of fact had waived the issuance and service of summons by entering his appearance in the Ohio court and filing his plea. In these circumstances the judge held that the Ohio court could not obtain jurisdiction until there was personal service on the soldier within the State of Ohio.

Eight French citizens residing in Paris, France, made and executed a power of attorney appointing an attorney-in-fact to represent and act for them with respect to their interests in a decedent's estate being administered in the Surrogate's Court in Nassau County, New York. The court held that the death of one of the principals did not revoke the power of attorney and that even though the principals were non-resident alien enemies, they were entitled to representation through their attorney in fact and that he might appear and be heard, together with an attorney designated by the Alien Property Custodian.

A member of the armed forces may apply for stay of proceedings under the Soldiers' and Sailors' Civil Relief Act at any stage of the proceedings and without compliance with the statutes of the state prescribing the time for filing and the requisites of a motion for continuance in the state where the proceedings are pending in a state court. It is so held by the Supreme Court of Iowa.

In a case decided by the Supreme Court of Georgia, an applicaton was made by the wife to set aside a divorce decree obtained by the husband in the same court. It appeared on the face of the record that the decree was void for lack of jurisdiction. On this ground the supreme court held that the application of the husband, who was in military service, to stay the wife's proceeding, was properly denied. In reaching this conclusion, the court pointed out that a person in military service is entitled to a stay as a matter of law unless it appears by relevant evidence that the soldier's right to prosecute or defend is not materially impaired, but that he need not affirmatively show that it is, and the court has jurisdiction to make such inquiry as he believes the justice of the case demands, either by way of obtaining evidence from either party or from the record itself.

The Supreme Court of the United States has decided that by the Selective Training and Service Act Congress has not authorized "judicial review of the propriety of a board's classification in a criminal prosecution for willful violation of an order directing a registrant to report for the last step in the selection process."

A superior court judge in California during his tenure in office accepted a reserve officer's commission in the United States Army Air Corps and reported for active duty for which he was compensated at a rate in excess of $500 per annum. The Supreme Court of California held that the holding of his judicial office was suspended during the time that the judge was on active service with the Army and that the provision of the California constitution precluding the eligibility to any civil office of profit under that state of any person holding any lucrative office under the United States did not apply.

An order of the War Production Board limiting the hours of operation of gasoline stations and the percentage of normal gallonage that could be sold by such stations would not justify the lessee in refusing to pay rent and claiming cancellation of his filling station lease under a provision of the lease granting the lessee the right to terminate and cancel if the use of the premises as an oil and gasoline filling and service station is "prohibited, limited or restricted by governmental authority." The Supreme Court of New York, Appellate Division, Second Department, held that this clause related to possible real estate restrictions and not to a regulation limiting the volume of business of the lessee and further that there was no such failure of consideration as to excuse the lessee from the obligation to pay rent.

The Supreme Court of New York, Queens County, has held that the provisions of the Soldiers' and Sailors' Civil Relief Act may not be applied to relieve a soldier from the necessity of immediate payment of obligations that are due unless the court is of opinion, based on proof that his ability to comply with the terms of his obligation has been materially affected by reason of his military service. The court further held that so far as war measures are concerned, federal statutes supersede similar state laws under Article VI of the federal Constitution and are binding on state courts.

TAX NOTES

EARLY Congressional action is expected on the new tax simplification plan announced by Chairman Doughton of the House Ways and Means Committee. Under this plan there will be three categories of taxpayers. First, those earning up to $5,000, whose income from sources not subject to withholding is not more than $100, will be relieved from filing tax returns. A taxpayer in this category will be permitted to file a copy of the withholding receipt furnished by his employer, on the reverse side of which he will list his "other income" and his dependents. The collector will compute his tax and either issue a refund check for any overpayment or bill the taxpayer for any underpayment. Second, those earning up to $5,000, whose income from sources not subject to withholding does exceed $100, and whose deductions do not exceed 10% of income, will be permitted to use a short-form return. The third category will include all other taxpayers, who will be required to file the regular form of return, which will be simpler than the form now in use.

In order to accomplish this plan the following changes in the tax law will be necessary:

(a) The present victory tax will be abolished. The present normal tax and surtax will be combined into a single surtax. A new 3% normal tax will be imposed on each person whose income exceeds $500.

(b) For the purpose of the surtax there will be a uniform exemption of $500 for each person. Thus, a single person's exemption will be $500; married persons will have an exemption of $1,000; and the exemption for each dependent will be $500.

(c) Every taxpayer with income up to $5,000 will be entitled to an optional deduction of 10% of income, in lieu of the statutory deductions for interest, taxes, charitable contributions, etc. Those whose incomes exceed $5,000 will be allowed an optional deduction of $500. Taxpayers whose actual deductions exceed these standard amounts may claim the benefit of their actual deductions by listing them in detail.

(d) The present withholding tables will be changed so that the tax withheld on wages and salaries up to $5,000 will be substantially equivalent to the actual final tax liability. The new withholding rates will go into effect January 1, 1945.

The Committee announced that the plan will be made applicable to returns to be filed March 15, 1945, for the year 1944. Generally, the plan does not change the number of taxpayers or the revenue yield, although in many instances the tax is either somewhat larger or smaller than liabilities computed under the current law.

Although not strictly part of a "simplification" program, two other proposals have been agreed upon in committee. One would extend until January 15, the date for final amendment of declarations by calendar year taxpayers. The other would allow the dependency credit for any person whose chief support is furnished by the taxpayer, irrespective of age or capability of self-support.

Jurisdiction of Circuit Courts to Reverse Decisions of Tax Court

In the landmark case of *Dobson* v. *Com'r*, (Sup. Ct., Dec. 20, 1943; 30 A.B.A.J. 94, Feb. 1944), the Supreme Court deliberately narrowed the scope of the Circuit Courts' jurisdiction with respect to decisions of the Tax Court. The court there held that the Circuit Court had no power to reverse a Tax Court decision involving the taxability of damages recovered by a purchaser on account of a transaction in which he had previously sustained a deductible loss. The issue, it was stated, was one of "tax accounting," not of "law," and as such was not reviewable.

Subsequently, in decisions two weeks apart, the Supreme Court alternately enlarged and contracted the scope of the *Dobson* decision. First, in a rehearing of the *Dobson* case (Feb. 14, 1944; 30 A.B.A.J. 161, March, 1944), it indicated that the question of "sale or exchange" under the capital gain statute may be one of fact, and therefore not reviewable. Then, in *Security Flour Mills Co.* v. *Com'r*, (Feb. 28, 1944, 30 A.B.A.J., 214, April, 1944), it sustained a reversal of the Tax Court on the question of whether deductions could be anticipated in order "to clearly reflect income" under I.R.C. § 45.

The Circuit Courts seem equally uncertain as to the application of the *Dobson* rule in the shadowy borderland between "fact" and "law." Tax Court decisions have been affirmed on the authority of that case in *Hunter* v. *Com'r*, C.C.A. 5, Feb. 18, 1944 (payments under forfeited option); *Repplier Coal Co.* v. *Com'r*, C.C.A. 3, Feb. 19, 1944 (capital v. expense, and net income for percentage depletion); *Medical Arts Hospital* v. *Com'r*, C.C.A. 5, March 7, 1944 (unreasonable accumulations); and *Helvering* v. *Meredith*, C.C.A. 8, March 11, 1944 (insurance-annuity combinations). Tax Court decisions have been reversed, despite the *Dobson* case, in *Smith* v. *Com'r*, C.C.A. 3, Feb. 2, 1944 (violation of rule against perpetuities); *Smith* v. *Helvering*, Ct. Ap. D.C., Feb. 14, 1944 (stock worthlessness); *Central Nat'l Bank of Cleveland* v. *Com'r*, C.C.A. 6, Feb. 16, 1944 (ownership of trust corpus); and *Mahaffey* v. *Helvering*, C.C.A. 8, Feb. 15, 1944 (gift of corpus or income).

It seems an ironical fact that the Supreme Court, in attempting to foreclose appeal litigation, has opened a new field of controversy, in which it will probably be called upon

(Continued on page 316)

Prepared by Committee on Publications, Section of Taxation: Mark H. Johnson, Chairman, New York City, Gustave Simons, Howard O. Colgan and Martin Roeder, New York City, and Allen Gartner, Washington, D. C.

(Continued from page 279)

should take precedence over the law. After cramming for a week on the issues, he went stumping with Bill Herndon through the country towns in support of the Lincoln ticket. In the latter part of October he wrote his affianced that "The result of this winter will decide whether I am to be a lawyer, soldier, politician, or good-for-naught." After the election he knuckled down to his law books, passed his examinations and became a lawyer at last. The relation which quickly developed between Lincoln and Ellsworth was described by Henry C. Whitney as "like that of knight and squire of the age of chivalry." At the same time Ellsworth threw himself with characteristic energy into an effort to reorganize radically the Illinois militia. He drafted a comprehensive reform bill because, as he expressed it, "I want to do them a favor before I leave the state forever." The bill passed the House but was ultimately defeated by a small margin in the Senate.

On February 11, 1861, Lincoln started for the nation's Capital. Ellsworth, who accompanied him, was charged with a large measure of responsibility for his protection. Lincoln had in mind to create a special bureau wherein his rare genius for military organization could be utilized. The jealousy of staff officers of the regular Army, "Who," as John Hay observed, "always discover in any effective scheme of militia reform the overthrow of their power," was, however, an obstacle. In the meantime, on the advice of General Buckner—then leader of the Kentucky State Guard, and destined to cast his lot with the Confederacy and, as commandant of Fort Donelson, to capitulate to Grant's ultimatum of "unconditional and immediate surrender"—Ellsworth accepted a commission in the regular Army as second lieutenant of the 1st Dragoons.

Immediately after the President's call for volunteers, Ellsworth threw up his commission and went to New York with the intention of raising a Zouave regiment from the city fire department. As he put it, "I want the New York firemen for there are no more effective men in the country, and none with whom I can do so much," adding ominously, "They are sleeping on a volcano at Washington and I want men who can go into a fight now." His most sanguine hopes were realized for within a few days a full regiment was recruited, known as the New York Fire Zouaves, of which he was chosen colonel. Within 12 days of his departure from Washington to New York he started back to the Capital with his regiment! The send-off given the picturesque command, led by the colorful boy colonel, was a memorable one. Five thousand firemen escorted them to the steamer. En route they were presented with a flag by Laura Keene, who four years later was to play an outstanding role in the tragedy at Ford's Theatre in Washington.

On May 7 the regiment was sworn into service in the presence of Lincoln and his son Tad. On May 23 Virginia seceded from the union and Federal forces, including Ellsworth's command, immediately crossed the Potomac and occupied Alexandria. In the last hours before his regiment was set in motion, this ardent youth apparently had a premonition of his approaching fate. To his beloved parents he wrote:

> Whatever may happen, cherish the consolation that I was engaged in the performance of a sacred duty; and tonight, thinking over the probabilities of tomorrow, and the occurrences of the past, I am perfectly content to accept whatever my fortune may be, confident that He who noteth even the fall of a sparrow will have some purpose in the fate of one like me. My darling and ever-loved parents, goodbye. God bless, protect and care for you.

To a company officer who observed him silent and musing, he observed, "I was thinking in which clothes I shall die." Selecting from his trunk a new uniform, he added, "If I am shot tomorrow—and I have a presentiment that my blood is immediately required by the country—it is in this suit that I shall die."

The entry of the Zouaves into Alexandria was unopposed. While marching through the city streets Ellsworth observed a Confederate flag floating over the Marshall House. With a detail of men he entered the inn, ascended to the roof and took it down. While descending the stairs a man, who was concealed in a dark recess, suddenly sprang out, and before he could be intercepted shot Ellsworth dead. Thus died the first commissioned officer to fall in the war.

Of this sudden tragedy Nicolay and Hay wrote:

> To the people of the North, already strung of high nervous tension, this drama stood out in vivid relief from the swift-moving incidents of rebellion; his youth, his knight-errant qualities of character, his high ambition, and his talent for leadership had made him extremely popular. Upon President Lincoln his untimely death fell with the force of a personal bereavement. He had brought Ellsworth to Washington among his suite of friends; had seen his magnetic power to control the crowds that thronged every footstep of the President-Elect; the echoes of his cheery and friendly voice seemed yet to linger in the corridors and rooms of the Executive Mansion.

As Lincoln viewed the body as it lay in state in the East Room of the White House he groaned, "My boy! my boy! Was it necessary this sacrifice should be made?"

To the grief stricken parents of Ellsworth, Lincoln wrote a letter which ranks with his celebrated epistle to Mrs. Bixby:

> In the untimely loss of your noble son, our affliction here is scarcely less than your own. So much of promised usefulness to one's country and of bright hopes for one's self and friends, have rarely been so suddenly darkened as in his fall. In size, in years, and in youthful appearance, a boy only, his power to command men, was surpassingly great. This power, combined with a fine intellect, and indomitable energy, and a taste altogether military, constituted in him, as seemed to me, the best natural talent, in that department, I ever knew. And yet he was singularly modest and deferential in social intercourse. My acquaintance with him began less than two years ago; yet through the latter half of the intervening period, it was as

intimate as the disparity of our ages, and my engrossing engagements, would permit. To me, he appeared to have no indulgences or pastimes; and I never heard him utter a profane or an intemperate word. What was conclusive of his good heart, he never forgot his parents. The honors he labored for so laudably, and, in the sad end, so gallantly gave his life, he meant for them, no less than for himself.

In the hope that it may be no intrusion upon the sacredness of your sorrow, I have ventured to address you this tribute to the memory of my young friend, and your brave and early fallen child.

May God give you the consolation which is beyond all earthly power.

Sincerely your friend in common affliction,

A. LINCOLN

A profound demonstration of sorrow and an impressive tribute of respect were everywhere paid to the remains of the glorious youth as they were borne north to the little village of Mechanicsville. This excerpt from the requiem of George W. Demers pronounced at Troy, New York, will fittingly close this odyssey of a young knight:

Sleep on, brave young warrior; narrow and silent is thy tent. The green mantle of thy mother earth shall enwrap thee instead of the robe of victory. Thy nodding plume shall be the bent branches of the weeping willow. The robin shall sound for thee thy morning reveille. Thy bugle note shall be the sweet song of the oriole. All night long the watch-fires of Heaven's dome shall burn above thy bed, whence no alarm shall rouse thee. But there be some lives great and glorious, which are accomplished in a few short hours, and such was thine. Grand was thy mission; grandly thou hast fulfilled it. Thy life was mortal, thy fame is immortality.

JUNIOR BAR NOTES

By HUBERT D. HENRY
Secretary, Junior Bar Conference

ONE way in which the young lawyers of the country are carrying on for their fellows in the service, little publicized, is their unselfish filling of the vacancies in the offices and committees of the Junior Bar organizations created by the heavy inroads of military service on the membership of these organizations. One of the heaviest tasks of the national chairman of the Junior Bar this year has been the filling of vacancies, which have exceeded all previous years. However, because of the way in which those who remain in practice are willing to take up the jobs left open by the call of country in military service, national Chairman James P. Economos has at all times been able to keep a complete set of committees and officers.

Howard Cockrill, of Little Rock, Arkansas, has resigned as chairman of the Committee on Restatement of the Law. This position has not yet been filled. Kerr Craige Ramsay, of Salisbury, has been appointed North Carolina state chairman to fill the vacancy created by the resignation of Charles H. Young, of Raleigh, now in the Army. Payne Karr, of Seattle, has been appointed Washington State chairman, succeeding John N. Rupp, now in service. Arthur M. Sebastian, of Columbus, has succeeded Oscar T. Martin as Ohio state chairman. James H. Kilbourne, of Billings, has been appointed Montana state chairman to succeed Edward Dussault. W. J. Jernigan, Jr., of Little Rock, has succeeded Blake Downie as Arkansas state chairman. Francis Donofrio, of Phoenix, is the new Arizona state chairman, filling the vacancy created by the resignation of Edwin Beauchamp. Massachusetts state chairman George C. Abernathy has resigned and is now devoting his legal talent to the use of the Navy. His successor has not been appointed. The military services are not overlooking the executive council, and Third Circuit Council Member Paul T. Huckin has resigned and entered service. His successor is now being selected by the Council.

The Junior Bar Conference has been sponsoring for over a year state traffic court conferences. The National Safety Council and the Automotive Safety Foundation, state and local bar organizations, official organizations and civic groups have joined in these conferences in an effort to bring about in all states and communities improvements in the administration of courts trying traffic cases. Three of these important conferences were held during March. The Georgia conference was held at Atlanta on March 7, the Alabama conference was held in Birmingham on March 10, and the South Carolina conference was held in Columbia on March 22. The latter was one of the best attended conferences held to date. On April 27, in Phoenix, the Arizona Traffic Court Conference was held. Many additional conferences will be held during the months of May, June, July and August. The Traffic Court Committee is working with bar association leaders in all states in an effort to have at least one conference in every state before the end of the year. States planning such conferences in the near future are: New Mexico, Wyoming, Texas, Iowa, Massachusetts, Connecticut, Rhode Island, Vermont, New York, Nevada, North Carolina, Ohio, Maryland, Northern California, Southern California, Kentucky, Tennessee, Okla-

homa, Virginia, Nebraska, New Hampshire, Idaho, Montana, Washington, Minnesota, and Florida. Although much of the success of these conferences is due to the work of the secretary of the Junior Bar Conference Traffic Court Committee, James P. Economos, who is able to visit bar leaders in most of the states prior to the conference, assisting them in setting them up, regional representatives of the National Safety Council, Harvey Booth, secretary of the Traffic Court Committee of the National Safety Council, and Norman Damon, vice president of the Automotive Safety Foundation, who attend these conferences, address them, lead panel discussions and assist in other ways with the program, the real success of the conferences is due to the work of the bar leaders and state and local officials. These men have the responsibility of getting meeting places, speakers, and sending invitations to the judges, enforcement and prosecuting officials who are invited to the conferences. The participation of busy state and local officials is evidence of the importance of this program in safety work in the various states. Circuit Judge Orie L. Phillips, chairman of the Judicial Administration Section of the American Bar Association, has announced that in all future conferences this Section will be a co-sponsor with the organizations above named. The Judicial Administration Section has given real support to the Traffic Court Program of the Junior Bar Conference as an important part of the American Bar Association's program to improve the administration of justice.

National Procedural Reform Director John S. Howland, of Des Moines, and his associate directors, are working very hard to complete as much of the Procedural Reform Survey as possible before the annual meeting in September. Part VII of the survey is now being printed and will be distributed shortly. Part VI of the Survey is well on its way to completion.

TAX NOTES

(Continued from page 313)

many times to determine whether the merits are open to litigation.

Husband-Wife Partnerships

The commonly used device of a husband-wife partnership to reduce the husband's surtax bracket received a severe setback in Francis E. Tower, 3 T.C. No. 49. The husband, the controlling stockholder of a manufacturing corporation, transferred part of his stock to his wife in contemplation of the liquidation of the corporation and of the formation of a limited partnership. The court held that the contemplated partnership negatived a "gift" of the stock, and then found that the partnership had no real existence because (1) it was formed to save taxes, (2) the husband continued to manage the business, (3) no new capital was introduced, (4) the nature of the business remained the same, (5) the wife contributed no services, (6) the husband drew no salary for his services, and (7) the wife used income for purchases "usually assumed by a husband for the welfare of his family." It was therefore held that the husband was taxable upon the entire income of the business.

Excess Profits Tax

Two recent Tax Court decisions have been rendered against the taxpayer in cases involving invested capital. In Butter-Nut Baking Co., 3 T.C. No. 54, the taxpayer collected fire insurance which it used for replacement of its damaged property. The insurance proceeds represented realized but unrecognized gain. The court refused to include this gain in "accumulated earnings and profits" for the purpose of the invested capital credit, since that term, as defined in I.R.C. § 115 (1), does not include unrecognized gain.

In Journal Publishing Co., 3 T.C. No. 65, the taxpayer sought to include in borrowed capital its liability under a written contract to pay a competitor for discontinuance of certain publications. The court held that such an obligation does not meet

the statutory requirement of an "indebtedness . . . evidenced by a bond, note, bill of exchange, debenture, certificate of indebtedness, mortgage, or deed of trust." The statute may not be interpreted as including other evidences of indebtedness. Nor could the contract be construed as a "note," which must be an unconditional promise to pay, not a mere obligation of one party expressed in a unilateral contract.

The University of Chicago Conference On War Contracts

A CONFERENCE on War Contracts, Renegotiations, and Termination was held at the University of Chicago on April 10, 11, and 12. At the first session, the recent amendments to the Renegotiation Act were discussed by W. James MacIntosh, General Counsel of the new War Contracts Price Adjustment Board. Laird Bell, chairman of the Navy Department Price Adjustment Board and vice chairman of the War Contracts Board, discussed "Major Factors in Determining Excessive Profits." He emphasized particularly the effect to be given to the amendment requiring renegotiation agencies to consider profit margins in the light of the presence or absence of the risk incident to reasonable prices, pointing out that contractors who have realized admittedly excessive profits cannot expect to be allowed as high a margin as would be the case if their prices had been reduced.

The second session was devoted to war contract pricing and repricing. Mr. Glen A. Lloyd, Assistant Director for Price in the Purchases Division, Headquarters, Army Service Forces, discussed "Pricing: The Key to Maximum Production." As his title indicated, he developed the view that for both industry and government, consideration of profits should be secondary to that of costs, emphasizing the importance of close pricing as a means of creating incentives to economy and efficiency in production. Price analysis was discussed in detail by Lt. Col. Paul F. Hannah, a former president of the Junior Bar Conference. Discussion from the standpoint of contractors was led by Edmond M. Cook of Davenport, Iowa.

The third session of the Conference was devoted to problems of contract termination, the legal and administrative background being presented by Lt. Col. Harold Shepherd, who is on leave from the Law School of Duke University and is serving as Chief of the Termination Section in the Office of the Chief of Ordnance. Practical suggestions for contractors' claims were discussed by Henry P. Isham, Director of Procurement, Termination and Renegotiation Policy in the Chicago Ordnance District.

The final session was devoted to "War Contracts and the Future of Enterprise." Hugh B. Cox, Assistant Solicitor General of the United States, discussed some of the economic consequences of termination policy, considering problems in the selection of contracts for termination, the relation between prime and subcontractors, and the making of partial payments. He suggested that since the mobilization of industry had unavoidably resulted in increased concentration of economic power, efforts should be made to organize demobilization in a way that may avoid abuse of this power and encourage competitive enterprise. Glen A. Lloyd discussed the interrelations of pricing, renegotiation and termination.

The Law School plans to publish the proceedings of the conference.

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CIVILIAN DEFENSE MANUAL

ON

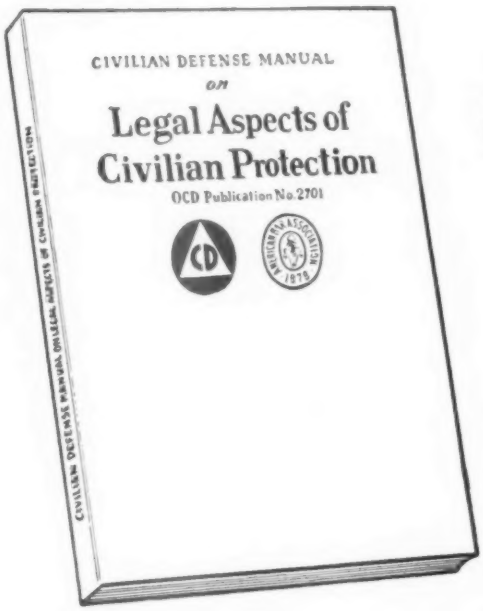
LEGAL ASPECTS OF CIVILIAN PROTECTION

Prepared under the auspices of the Special Committee on Civilian Defense of the

AMERICAN BAR ASSOCIATION

for the

UNITED STATES OFFICE OF CIVILIAN DEFENSE



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The 240 pages of the Manual provide the guiding statutes, regulations, and court decisions, as well as the source material necessary for the lawyer concerned with Civilian Protection problems.

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